
12/08/95: CARP: DISTRIBUTION OF 1990, 91, & 92 CABLE ROYALTY FUNDS

PAGE 905 TO PAGE 1114

NEAL R. GROSS & CO., INC.

(202) 234-4433

**CONDENSED TRANSCRIPT AND CONCORDANCE
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have for.

(11) MR. LANE: Plus the testimony that was (12) given by Mr. Bortz on this exhibit.

(13) CHAIRPERSON JIGANTI: So your contention (14) concerning Section 251.48 -

(15) MR. LANE: It does not have the standard (16) error for each component as required, and there was a (17) discussion yesterday when Mr. Bortz was on the stand (18) that the standard error in the original weighted (19) results were totally different and couldn't be (20) compared. So there is clearly some sort of a (21) difference there, at least one that I was unable to (22) explore with the witness because he just claimed that (23) it wasn't a valid explanation.

(24) I don't - Mr. Bortz pointed us to a (25) formula. I have not had a chance to see if that

Page 913

(1) indeed is the formula that could be used to derive (2) these.

(3) CHAIRPERSON JIGANTI: Now, that is all (4) still going to four - subparagraph ii there?

(5) MR. LANE: Yes. That's a number - that's (6) single i. The formula used for the statistical (7) estimates.

(8) CHAIRPERSON JIGANTI: Okay.

(9) MR. LANE: He indicated that it was in his (10) Appendix D. I have not had a chance to verify that. (11) Nor is there any indication in Appendix D other than (12) his testimony that that is the formula. I'm going to (13) assume that we have three in a very general sense - (14) that we did get the underlying data, and presumably (15) these are from those data.

(16) And I guess that takes care of three and (17) four.

(18) CHAIRPERSON JIGANTI: Any other (19) objections? All right, a response to the motion then, (20) Mr. Neiman?

(21) MR. NEIMAN: Mr. Gersch.

(22) CHAIRPERSON JIGANTI: Mr. Gersch.

(23) MR. GERSCH: Thank you. First, let me (24) make a clarification that Mr. Bortz is asking me to (25) make. His recollection is that he was ambiguous in

Page 914

(1) describing how this was calculated, and has asked me (2) to set the record straight. And if anyone should like (3) to question him on it, he's still here.

(4) And that is, what these are, okay, is -

(5) CHAIRPERSON JIGANTI: First of all, there (6) is nothing in the record

from Mr. Bortz right now (7) about the statement you just made. His testimony is (8) as it is, and anybody can draw any conclusion they (9) want from it. Now your next aspect - go ahead.

(10) MR. GERSCH: I'll try and revisit that (11) matter in the right procedural way later. In (12) responding to Mr. Lane then, I'd like to make three (13) points real briefly. The first is, this is in the (14) nature of supporting classic redirect testimony.

(15) In the cross examination by Mr. Lane on (16) behalf of the MPAA, he went over with Mr. Bortz the (17) stratification process, the weighting, why did you (18) draw the stratification where you did, all within an (19) effort to suggest that perhaps there may be some hanky (20) panky there, perhaps if you drew the lines (21) differently, you could come up with different results, (22) presumably more favorable to MPAA.

(23) There was that line of questioning. And (24) in response, Mr. Bortz said no, that doesn't really (25) work that way because if you looked - if you didn't

Page 915

(1) stratify or if you don't weight the results and you (2) look within the stratification and get behind the data (3) and get underneath it and look at what's going on (4) inside the individual strata, you still see that at (5) every level, the smaller operators or the smaller (6) royalty level operator - the ones in the middle, the (7) ones on the top - they all rank sports first.

(8) So this was just in the nature of (9) redirect. And all I wanted to do was to bring out (10) that when Mr. Bortz was saying that speaking off the (11) top of his head on cross, that he was - he could back (12) it up with actual figures. That was the point of (13) that.

(14) The second point I wanted to make was that (15) I wanted to put this in context. We are not asking, (16) and Mr. Bortz is not asking, that the panel make any (17) award on the basis of Joint Sports Exhibit 6. We're (18) pointing to the figures that are in his survey, and we (19) respect Mr. Lane's objections that these don't fit the (20) requirements of Rule 251.48.

(21) Those rules apply to the constant sum (22) survey. The issues about confidence intervals and (23) the like, they go to the survey. And the survey does (24) have confidence intervals. The sole point of this (25) Joint Sports Exhibit 6 is to explain in response to

Page 916

(1) the mind of argument that was

advanced by Mr. Lane (2) that even if you go inside the strata, even if you (3) look at what's going on underneath that 38.8% number, (4) you don't get wide variation.

(5) At every level, the operators are still (6) saying sports is first. And the last point simply is (7) Mr. Lane, I believe, just conceded he does have the (8) agreement. And as he also conceded, this was in a (9) previous report. He knows that this argument has been (10) made in the past in response to arguments by him that (11) maybe the stratification wasn't done right.

(12) He can run any numbers he wants. He can (13) present rebuttal. He can do anything he wants with (14) it.

(15) CHAIRPERSON JIGANTI: Okay, Mr. Lane, a (16) brief response?

(17) MR. LANE: A brief response. First of (18) all, subsection four involves studies involving (19) statistical methodology. That's what this is. (20) Regardless of what the other study is, that's what's (21) on this page. Second, Joint Sports' decision in this (22) case not to put this on until the last minute - they (23) could have put it on. They put on a lot of things in (24) other cases they've been - so it's not in any of the (25) business of this case.

Page 917

(1) It's not in the record.

(2) CHAIRPERSON JIGANTI: You've made that (3) argument before. Anything in rebuttal?

(4) MR. LANE: Yeah, one final point. One of (5) the key things here is they say there's not a wide (6) variation. When I look at this, to my untrained eye, (7) I see a difference of over seven percentage points (8) just in the sports. And without the confidence (9) intervals, there's no way for me to tell or for you to (10) tell whether that's a wide variation.

(11) You just look at strata three and strata (12) four just for the sports, there are a lot of other (13) numbers that have, in my opinion, a very wide (14) variation.

(15) CHAIRPERSON JIGANTI: Thank you very much.

(16) ARBITRATOR FARMAKIDES: Mr. Lane, I (17) understood that this was in response to your cross. (18) This was submitted in response to your cross. You're (19) suggesting that it was not?

(20) MR. LANE: That's correct.

(21) ARBITRATOR FARMAKIDES: Could you clarify (22) that for me?

(23) MR. LANE: I think I asked Mr. Bortz, (24) despite what Mr. Gersch thought that I was doing, I (25) asked

Page 905

(1) BEFORE THE
(2) COPYRIGHT ARBITRATION ROYALTY PANEL
(3) - - - - -
(4) LIBRARY OF CONGRESS
(5) - - - - -
(6)

(7) -----
(8) DISTRIBUTION OF 1990. Docket No.
(9) 1991 AND 1992 94-3-CARP-CD90-92
(10) CABLE ROYALTY FUNDS
(11) -----

(12) Hearing Room 414, Fourth Floor
(13) Madison Building
(14) Library of Congress
(15) 101 Independence Avenue, S.E.
(16) Washington D.C.

(17) Friday, December 8, 1995
(18) The above-entitled matter came on for hearing,
(19) pursuant to notice, at 9:30 a.m.

(20) BEFORE:
(21) THE HONORABLE MEL R. JIGANTI, Chairperson
(22) THE HONORABLE JOHN B. FARMAKIDES
(23) THE HONORABLE RONALD WERTHEIM
(24)
(25)

Page 906

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Page 909

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
WITNESS	JAMES TRAUTMAN	By Mr. Neiman	920							
	By Mr. Hester			968					1088	
	By Mr. Stewart			997					1106	
	By Mr. Campanelli			1010						
	By Mr. Lane			1025						
	By Mr. Satterfield			1110						
	VOIR DIRE BY MR. LANE ON PAGE 923									

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
EXHIBITS	Exhibit No.	Description	Marked							
Received	(13)	Joint Sports Claimants								
	(14)	JS7	Graphical Representation of Table 1						932	
	(15)	Public Broadcasters								
	(16)	2-X	PTV Exhibit 38						937	
	(17)	Devotional Claimants								
	(18)	1-X	ELRA Study						1024	
	(19)	Program Suppliers								
	(20)	13-X	Comparison of 1992 Bortz Study						1060	
	(21)	14-X	Random Survey 129						1071	
	(22)	15-X	Questionnaire						1076	
	(23)									
	(24)									
	(25)									

Page 910

(1) P-R-O-C-E-E-D-I-N-G-S
(2) (9:39 a.m.)
(3) CHAIRPERSON JIGANTI: This is day four of (4) the proceedings. We left off yesterday with the (5) discussion concerning Joint Sports Claimants' Exhibit (6) Number 6. My memory fails me a little bit, so maybe (7) we should start from scratch on that exhibit. It was (8) sponsored - or a motion was made by the Joint Sports (9) Claimants to admit - it is Exhibit 6, is it?
(10) MR. GERSCH: It is. We were going to (11) substitute for it a version that blocks out all of the (12) 1989 and 1992 data, and I have that here.
(13) CHAIRPERSON JIGANTI: I'd

appreciate that (14) if you would distribute it, and we can - I'd like to (15) start that discussion again from the beginning. All (16) right, counsel for the Joint Sports Claimants, you're (17) proposing to be admitted into evidence Joint Sports (18) Claimants Exhibit Number 6, is that correct?
(19) MR. GERSCH: That's correct.
(20) CHAIRPERSON JIGANTI: All right, and there (21) has been an objection to it by -
(22) MR. GERSCH: Mr. Lane.
(23) MR. LANE: Program Suppliers has an (24) objection.
(25) CHAIRPERSON JIGANTI: All right. And the

Page 911

(1) basis of your - I know we went through some of this (2) yesterday and we sort of hurried, so I'd like to go (3) back and let's do it in a more orderly fashion. The (4) basis of your objection, Mr. Lane?
(5) MR. LANE: There were several bases, Mr. (6) Chairman. First, just kind of question the fairness. (7) We had never seen the document before it was (8) presented. It was clearly information that could have (9) been - in the direct case at the time it was filed. (10) I think there was even - been an allusion that it was (11) put in in prior cases.
(12) So, there was a decision made by Joint (13) Sports Claimants at the time they prepared the direct (14) case not to put something like this in the record.
(15) They then changed their minds for whatever reason. (16) But we didn't have a chance - the problem - the (17) prejudicial aspect of that from our standpoint was we (18) didn't know this was going to come in.
(19) We didn't have a chance to prepare for it. (20) We didn't have a chance to cross. We did have a (21) chance to cross. We didn't have a chance to prepare (22) for cross other than the five minutes that I had this (23) document before I had to start my cross. In addition, (24) I objected on grounds that it failed to satisfy (25) Section 251.48F4 in particular.

Page 912

(1) I have a question about whether it does (2) not satisfy little "i," but it certainly didn't (3) satisfy "ii," and that has not been corrected over (4) night. It doesn't satisfy any of the provisions (5) except that perhaps Mr. Bortz described number four; (6) and perhaps he told us what the formula was in number (7) one of that provision.
(8) So, on all those grounds, I would move to (9) strike this.
(10) CHAIRPERSON JIGANTI: So you

background?

(12) **A I have a master's in business administration from the University of Colorado, and a (14) bachelor's degree in economics from Claremont College.**

(15) MR. NEIMAN: At this time, I'll make Mr. (16) Trautman available for voir dire.

(17) CHAIRPERSON JIGANTI: Mr. Lane?

(18) MR. LANE: Thank you.

(19) VOIR DIRE

(20) BY MR. LANE:

(21) Q Mr. Trautman, when did you prepare this (22) history and analysis of the CRT cable operator surveys (23) that you presented in this case?

(24) **A I prepared the study earlier this year.**

(25) Q And roughly how long did it take you to

Page 924

(1) prepare that?

(2) **A I believe that the study was prepared over (3) the course of approximately three months.**

(4) Q What documents did you read to prepare (5) this study?

(6) **A I read the reports that had been prepared (7) by the – those who had filed in proceeding. I read (8) the – in the cases of reports for which there has not (9) yet been a proceeding or was not a proceeding, I read (10) those reports as well. In the cases of the most (11) recent studies which are presented in this report, I (12) based my analysis on my own involvement with the (13) studies.**

(14) Q Is that all you read?

(15) **A I read the determinations of which we have (16) –**

(17) Q Did you read any transcripts?

(18) **A Of testimony?**

(19) Q Yes.

(20) **A No, I did not.**

(21) Q Did you read any of the rebuttal testimony (22) of other parties in response to the reports?

(23) **A Well, I have – I should say that I have (24) read that testimony over the course of my work with (25) this study. I did not read it specifically again**

Page 925

(1) **during the preparation of this report.**

(2) Q So you mean over the course of 12 years, (3) at some point you were – had to read the rebuttal (4) testimony because you were involved in like the 1983 (5) study, is that fair to say?

(6) **A That's correct.**

(7) Q But you didn't read it just before

you (8) prepared this report, did you?

(9) **A No, I did not.**

(10) Q How did you determine – you have what's (11) called a criticism section, do you not, for each of (12) these studies?

(13) **A Yes.**

(14) Q For example, on page two, if I looked at (15) each study, I would find that on each page, right? I (16) mean, and for each study, a similar section?

(17) **A Yes, you would.**

(18) Q And how did you determine that?

(19) **A The criticisms contained there are (20) principally – come from the reading of the reports (21) prepared by the individual parties who submitted these (22) documents. For example, BBDO's 1979 report refers to (23) modifications which were made in response to (24) criticisms of its 1978 study.**

(25) **I also referred to criticisms which were**

Page 926

(1) **contained in the Tribunal determinations.**

(2) Q Did you refer to any criticisms that were (3) contained in rebuttal testimony for any of these (4) reports?

(5) **A I don't believe that I did, no.**

(6) Q And is this supposed to be an exhaustive (7) list of all the criticisms for each of these reports?

(8) **A No, it is not intended to be that.**

(9) Q This is just your analysis of what you (10) think are some of the criticisms that might apply to (11) these reports?

(12) **A This is my assessment of the criticisms (13) that either were accorded weight by the Tribunal or (14) appeared to have been used in making modifications by (15) the parties who filed the reports.**

(16) Q Now, are you also testifying about the (17) 1990 and '91 methodology and result – I'm sorry, the (18) 1990 and '91 Bortz studies methodology and results?

(19) **A Well, the 1990 study was not a Bortz (20) study. That study was executed by Burke Marketing (21) Research.**

(22) Q Okay. But that modification, are you (23) presenting testimony about the methodology and results (24) of those two studies?

(25) **A I am presenting the results of those**

Page 927

(1) **studies in – as set forth in a review of the history (2) of the proceedings here. I'm prepared, because of my (3) familiarity, to**

discuss issues related to that.

(4) Q Well, you're the only witness that's (5) available to discuss the methodology of those reports, (6) isn't that correct?

(7) **A Yes.**

(8) Q And what was your involvement in those (9) studies?

(10) **A I had day to day management responsibility (11) for the 1991 study. In terms of the 1990 study, the (12) only involvement of my firm and myself was in the (13) tabulation of the results.**

(14) MR. LANE: Those are all the questions I (15) have.

(16) DIRECT EXAMINATION (continued)

(17) MR. NEIMAN: Mr. Trautman, before we begin (18) going through your report, I understand that you have (19) one correction that you want to make to the 1990 (20) survey.

(21) THE WITNESS: Yes, I do. If you could (22) refer to the summary table on roman numeral six.

(23) MR. LANE: What page?

(24) THE WITNESS: Roman numeral six.

(25) ARBITRATOR WERTHEIM: It's the one

Page 928

(1) following the introduction?

(2) THE WITNESS: Yes, Table 1. For the 1990 (3) study, a correction was made in the tabulations. And (4) the resulting changes in the allocations are that (5) sports changes from 37.2 to 37.1. Movies changes from (6) 30.1 to 30.2. Syndicated shows, etc. changes from (7) 14.5 to 14.3. News and public affairs is unchanged. (8) Devotional changes from 3.6 to 3.8. And both PBS and (9) Canadian are unchanged.

(10) CHAIRPERSON JIGANTI: And this – your (11) motion was to amend, is that correct, your exhibit?

(12) MR. NEIMAN: Yes, Your Honor; we've (13) provided the underlying data to the MPAA regarding (14) this change, and we simply wanted to correct the (15) record. If you think that a motion to amend is the (16) appropriate way to do it, then that's what we're (17) doing.

(18) CHAIRPERSON JIGANTI: What I'm concerned (19) about is the record at a subsequent time. I want to (20) make sure the record reflects the exhibit that has (21) been admitted into evidence, and it's going to show (22) the correct figures.

(23) MR. NEIMAN: We'll move to amend the (24) exhibit then, Your Honor.

(25) CHAIRPERSON JIGANTI: No objections? The

him questions about the stratification,

Page 918

(1) primarily about the royalty calculations, why he used (2) those particular formulas and cut off numbers. I (3) didn't ask him what effect it would have. I just (4) asked him why he used them, why did he not use the (5) actual royalties.

(6) You recall that was a series of questions (7) that I had. So, I don't believe that I used it for (8) the purpose that Mr. Gersch claimed that I did.

(9) CHAIRPERSON JIGANTI: The panel has (10) conferred, and it's the judgement of the panel that (11) the objection will be sustained because of the lack of (12) the confidence level.

(13) MR. GERSCH: Thank you, Your Honor.

(14) MR. LANE: Mr. Chairman, just to clarify, (15) does that also include the testimony relying on this?

(16) ARBITRATOR WERTHEIM: You're speaking of (17) the redirect testimony?

(18) MR. LANE: Right, I mean - yes, and the (19) cross. I mean, in my mind, I would have preferred (20) that you had made this ruling beforehand, but since (21) you didn't, I would like that stricken as well. I'm (22) sorry, I just meant redirect and recross. I was - (23) just so there's a clarification. I didn't mean my (24) whole cross.

(25) MR. GERSCH: Just the redirection - I

Page 919

(1) know this is -

(2) (Laughter.)

(3) MR. LANE: Exactly, sir.

(4) CHAIRPERSON JIGANTI: That motion would be (5) denied, Mr. Lane - the motion to strike any of the (6) testimony. All right, at the present time then, Mr. (7) Bortz was excused. The next witness is -

(8) MR. NEIMAN: The next witness is Mr. (9) Trautman. I know there's some motions pending related (10) to Mr. Trautman's testimony.

(11) ARBITRATOR WERTHEIM: I thought we ruled (12) on them all.

(13) MR. NEIMAN: Were those included in the (14) rulings that you announced - you were referring to (15) all of the motions related to the Joint Sports (16) witnesses?

(17) ARBITRATOR WERTHEIM: I think we covered (18) all the motions relating to the JSC evidence. We (19) haven't distributed the written order yet. That (20) should be available this morning some time.

(21) MR. NEIMAN: Okay.

(22) CHAIRPERSON JIGANTI: It's on my desk now.

(23) MR. NEIMAN: Well, Joint Sports Claimants (24) will call James Trautman then.

(25) CHAIRPERSON JIGANTI: Mr. Trautman, would

Page 920

(1) you stand and raise your right hand?

(2) Whereupon,

(3) JAMES M. TRAUTMAN (4) was called as a witness, and after having been first (5) duly sworn, assumed the witness stand, was examined (6) and testified as follows:

(7) CHAIRPERSON JIGANTI: Thank you, please be (8) seated.

(9) DIRECT EXAMINATION

(10) BY MR. NEIMAN:

(11) Q Would you state your full name for the (12) panel, sir?

(13) A James M. Trautman.

(14) Q And what do you do, Mr. Trautman?

(15) A I direct the - I am a Senior Vice (16) President with Bortz & Company Inc. I direct the (17) cable television practice of Bortz & Co. specializing (18) in the areas of market research, strategic planning, (19) and economic feasibility analysis.

(20) Q Give us some examples of kinds of projects (21) that you do for Bortz & Co.

(22) A Sure. My work is primarily done for cable (23) program - two categories of participants in the cable (24) industry, cable programming networks and cable system (25) operators. The work that I do for cable programming

Page 921

(1) networks primarily revolves around reviewing the (2) opportunity for new cable programming networks to (3) launch in the market, as well as working with existing (4) programming networks in valuing those networks and (5) assessing their future prospects.

(6) I have worked with in excess of 20 cable (7) programming networks. And the key part of the (8) research that we do with those networks in assessing (9) their market opportunities is to assess - is to (10) conduct interviews with multiple system operator, or (11) MSO, programming executives in order to get their (12) assessment of the value of the concept and the (13) relative appeal and opportunity for those programming (14) networks in the marketplace.

(15) Also, to get their judgements as to the (16) changes or modifications in the positioning of those (17)

networks that may assist those networks to perform (18) more effectively in the future. That research is used (19) as a basis for decision making and business planning (20) in terms of projecting potential market penetration, (21) assessing potential revenues, and those types of (22) things.

(23) Q How long have you been with Bortz & Co.?

(24) A I've been with Bortz & Co. for 11 years (25) now, since 1983 - actually 12 years.

Page 922

(1) Q And what has your involvement been in the (2) constant sum surveys that have been submitted in these (3) proceedings?

(4) A Well, let me first just quickly state that (5) the other aspect of my practice is working with cable (6) system operators. And I am a co-founder and director (7) of the Competitive Strategies Group, which is a joint (8) venture of Bortz & Co. And Media Management Service (9) is another consulting firm.

(10) And we work with cable operators in (11) helping to assess their strengths and weaknesses in (12) meeting coming competition in the marketplace, (13) including direct broadcast satellite and some other (14) new technologies - telephone company competition.

(15) Q I didn't mean to cut you off, Mr.

(16) Trautman.

(17) A I'm sorry.

(18) Q Why don't you tell the panel now about (19) what your involvement has been in the constant sum (20) surveys in these proceedings?

(21) A Well, I have been with Bortz & Co. since (22) the initial Bortz & Co. study that was submitted in (23) these proceedings and have had day to day management (24) responsibility for all of the Bortz & Co. studies, (25) 1986, 1989, 1991, 1992 and 1993. I also was with

Page 923

(1) Brown, Bortz & Coddington, or BBC, which submitted a (2) study in the 1983 proceeding.

(3) I had a relatively limited role in that (4) study.

(5) Q And have you reviewed the other studies of (6) cable operators that have been submitted in these (7) proceedings?

(8) A Yes, I have. I've reviewed the reports (9) that were prepared in conjunction with those studies, (10) and also the determinations of -

(11) Q And what's your educational

(12) In 1979, you will see a manager's column, (13) the third column from the left that they also (14) performed a survey of individual cable system (15) managers. In each instance, their responses placed (16) here and the values placed here reflect a response to (17) a question which asked the respondents to allocate a (18) \$100 dollar value across the various categories of (19) programming that were included in the study.

(20) You can see that in 1978, that the four (21) categories listed first in the left-hand column were (22) included in the study. From 1979 through 1980, a PBS (23) category of programming was also added to the study.

(24) The results show a general ranking of live (25) professional and college sports and movies as the two

Page 935

(1) most valuable programming categories, followed by (2) syndicated shows, and series and news and public (3) affairs programs.

(4) I should caution you that the categories (5) listed here may have changed slightly in terms of (6) their precise wording from year to year, and this is (7) just for convenience of the tabular presentation.

(8) ARBITRATOR WERTHEIM: On your graph that's (9) been marked as Exhibit 7, I take it that the (10) distinctions between the MSO's and manager's reports (11) are too slight to make any difference in their (12) appearance on the graph?

(13) THE WITNESS: Well, actually, in terms of (14) the time series, this is a little bit tricky. But for (15) representation purposes, you see the survey is both (16) represented each as a separate point on the graph.

(17) ARBITRATOR WERTHEIM: Oh, I see.

(18) MR. NEIMAN: It may be, Your Honor, down (19) at the bottom. It's a little small. Why don't you go (20) through that bottom line there so that they can see (21) what each of those surveys –

(22) THE WITNESS: As you see, the points here (23) reflect 1978. The point here reflects the 1979 MSO (24) survey. Points here up represent the 1979 manager's (25) survey. Points here represent the 1980 survey. Again

Page 936

(1) here, we had two studies conducted for the 1983 (2) proceeding, so there are two points which both reflect (3) studies performed for the 1983 proceeding.

(4) BY MR. NEIMAN:

(5) Q And from that point forward, it's all one (6) study per –

(7) A Per year.

(8) Q – per year?

(9) A Yes.

(10) Q Now was Bortz & Co. or Paul Bortz himself (11) involved in the '78 to '80 studies?

(12) A No, not at all. And let me talk a little (13) bit about the results to those studies. In (14) particular, the change in results from the 1980 – (15) 1978 study to the 1979 MSO survey results. And what (16) you see is that BBDO's 1979 study accorded a reduced (17) value to movies in comparison with 1978, and an (18) increased value essentially to all other categories.

(19) BBDO in the 1978 study, which was the (20) initial constant sum survey prepared in these (21) proceedings, did not refer specifically to distant (22) signal programming until the allocation question. (23) All other questions leading up to that question (24) referred to all cable programming, including cable (25) networks, pay services, essentially all of the

Page 937

(1) programming that the cable operators carried at the (2) time.

(3) And therefore, BBDO attributed the change (4) from 1978 to 1979 to a better perception. In 1979, (5) they made the change in their methodology to refer (6) only to distant signal programming throughout the (7) questions leading up to the constant sum question. (8) And they felt that respondents may not in the 1978 (9) study have fully distinguished between distant signal (10) programming and all of the other programming carried (11) by other cable networks.

(12) And particularly, they referred to that (13) respondents may have not distinguished fully between (14) pay movie services such as HBO. And that change, I (15) think, would be consistent with my experience also, (16) particularly given that the HBO type movie service was (17) really in its heyday in that period of time. It was (18) still new.

(19) The basic service programming package was (20) regulated still at that time in terms of its price, (21) and therefore premium services had a very great (22) competition – or contribution to cable revenues. And (23) therefore, if respondents were not making that (24) distinction, it's likely that they would have accorded

(25) a very high value to movies.

Page 938

(1) CHAIRPERSON JIGANTI: Is there anything (2) distinguishable between MSO's and managers?

(3) THE WITNESS: In the results?

(4) CHAIRPERSON JIGANTI: Why would there be (5) a four point variance, in other words, between the (6) MSO's and managers in 1979 as compared to the movies?

(7) THE WITNESS: Well, I think actually that (8) what the 1979 – the two studies in 1979 really (9) illustrate is the consistency of response between (10) MSO's and managers.

(11) CHAIRPERSON JIGANTI: A four point (12) difference in movies is consistent?

(13) ARBITRATOR WERTHEIM: Close to five.

(14) THE WITNESS: Well, I would say that if (15) you look at the various categories of programming, (16) allocations – the allocation to movies is actually (17) higher by the managers in that year.

(18) CHAIRPERSON JIGANTI: Well, what did – is (19) there anything in presenting the cable system, in an (20) individual system, that would distinguish one owned by (21) a multiple system than one owned individually?

(22) THE WITNESS: In terms of the response to (23) the movies category?

(24) CHAIRPERSON JIGANTI: That would account (25) for the fact that there's such a – there is a four,

Page 939

(1) almost five percentage point difference with regard to (2) movies.

(3) THE WITNESS: I am not aware of a (4) distinction that would cause managers to respond (5) substantially differently to movies than MSO's did.

(6) BY MR. NEIMAN:

(7) Q Mr. Trautman, about how many MSO's are (8) involved in that 1979 study?

(9) A In the 1979 study, BBDO attempted to (10) contact the 50 largest cable multiple system (11) operators. The industry has consolidated somewhat; (12) but at that time, the 50 largest MSO's, I believe, (13) accounted for approximately 70% of all cable (14) subscribers. BBDO was able to contact in 1979 and (15) achieve useable responses from 31 of those 50 MSO's.

(16) And the 31 represented on the order of 40% (17) of the subscribers in the United States.

(18) Q And about how many system

Page 929

(1) motion will be allowed.
 (2) BY MR. NEIMAN:
 (3) Q Mr. Trautman, turning to the chart up (4) here, can you explain to the panel what this chart is?
 (5) **A Yes, this chart is a graphical representation of the numerical results that are set (7) forth on Table 1. It merely – each point on the (8) chart represents the corresponding number on Table 1 (9) for the year – the particular year.**
 (10) Q And looking at this chart, what can you (11) tell us about the consistency of the results of these (12) studies over the years?
 (13) **A Well, there were really three elements (14) that I have in mind when I think of consistency in (15) looking at the history of these studies. The first is (16) that the findings reflected in this chart are (17) consistent with my experience and the changes that are (18) evidenced particularly in the larger categories in the (19) numbers over a period of time are consistent with my (20) assessment of changes in the marketplace.**
 (21) **The second element of consistency is that (22) over a period of time, you see a relatively consistent (23) ranking of the various categories. In other words, (24) the lines do not tend to cross on many occasions. (25) There's a consistency over a period extending all the**

Page 930

(1) **way from 1978 to 1993 in general.**
 (2) **And thirdly, when you look at the absolute (3) values that are reflected in the chart, we would see (4) between – over this period in general a relatively (5) narrow range for a given category in terms of the (6) absolute response.**
 (7) Q And what –
 (8) MR. LANE: Mr. Chairman, before we go on, (9) is there – is this chart some place in the testimony?
 (10) CHAIRPERSON JIGANTI: Counsel?
 (11) MR. NEIMAN: Your Honor, this chart simply (12) is a graphical representation of Exhibit – of the (13) chart on page roman numeral six in the testimony.
 (14) MR. LANE: You're talking about a chart (15) that none of have except it happens to be on the (16) easel. It's nowhere in the record. It hasn't been (17) reduced to something that we can deal with on the (18) record.
 (19) CHAIRPERSON JIGANTI: Represent – well, (20) your objection

concerns the record, concerns fairness (21) – just what is your objection?
 (22) MR. LANE: The objection concerns that (23) none of us have this chart, although we can all look (24) at the easel. He's making all these statements on the (25) record about something that is not in the record, and

Page 931

(1) as far as I can tell, won't be in the record. It will (2) be meaningless.
 (3) And if this is going to be something (4) that's worth anything, we should have all had copies (5) at the time the testimony was given.
 (6) CHAIRPERSON JIGANTI: I take it you have (7) two basic objections to them then. Do you wish to (8) respond to those?
 (9) MR. NEIMAN: Yes, Your Honor. This chart (10) is simply a graphical representation for ease of (11) presentation of testimony that is in the record. (12) We're happy to make a copy in reduced size to place in (13) the record if that will be helpful, but this is simply (14) for ease of presentation.
 (15) CHAIRPERSON JIGANTI: Put an (16) identification number on it so that we know what we're (17) referring to. I don't care whether you use it this (18) way or if you want to make it easier for everybody and (19) so the record can be more manageable later on, that (20) will be fine. If you want to reduce it, as long as (21) nobody has a real objection to it.
 (22) But get an identification number on there.
 (23) MR. NEIMAN: Okay.
 (24) CHAIRPERSON JIGANTI: What it is – I know (25) you represent that it's a graphical representation of

Page 932

(1) Table 1. If you want to put – reference it to 1A so (2) that it's rather consistent, I think that will be a (3) way to handle it. Number two is a matter of – one is (4) the record and two is didn't have it before. It's (5) been represented that it's merely a graphical (6) representation of something that you do have.
 (7) I don't know that that prejudices you. It (8) doesn't seem to me that it does. And your objections (9) will be overruled to it. It is now marked as Joint (10) Sports Exhibit 7.
 (11) (Whereupon, the above- (12) referenced document was marked (13) as Joint Sports Exhibit 7 for (14) identification.)
 (15) MR. HESTER: Could I make a suggestion (16) that it could be 7X. I thought that was our (17) convention for designation of evidence.

(18) CHAIRPERSON JIGANTI: Well, that was for (19) cross examination.
 (20) MR. HESTER: Just cross? So there won't (21) be an X on here in exhibits of this sort?
 (22) CHAIRPERSON JIGANTI: That's correct.
 (23) ARBITRATOR WERTHEIM: Well, this is the (24) first time we've had an occasion where as part of the (25) direct testimony your witness is presenting something

Page 933

(1) that's marked as an additional exhibit.
 (2) ARBITRATOR FARMAKIDES: Look, I feel a (3) little differently. It seems to me anything at all (4) that's going into the record should be marked and made (5) available to everyone else. Because it's terribly (6) important that the record be clear, and I think that's (7) part of Mr. Lane's objection.
 (8) MR. NEIMAN: Well, Your Honor, we're happy (9) to provide it to everyone. I ask your indulgence to (10) proceed with the examination now.
 (11) CHAIRPERSON JIGANTI: And you will provide (12) a version that's letter size –
 (13) MR. NEIMAN: Yes, Your Honor.
 (14) CHAIRPERSON JIGANTI: – so everybody can (15) see it? In my estimation, this is merely a graphical (16) representation of Exhibit Number 1. It's helpful, (17) it's not prejudicial to anybody. Everybody's had the (18) information and you may proceed.
 (19) MR. NEIMAN: Mr. Trautman, why don't you (20) take us through the exhibit and explain the constant (21) sum surveys that are shown on there. Let's start with (22) the first group, '78 through 1980.

(23) THE WITNESS: All right, you can – if you (24) prefer, refer to the left-hand side of the graph or (25) also the left-hand four columns on your Table 1.

Page 934

(1) These represent the constant sum surveys that were (2) conducted for the 1978, 1979 and 1980 proceedings, the (3) results of responses or value allocations to the (4) constant sum questions that were included in those (5) surveys.
 (6) Each of these surveys was executed by (7) BBDO, the research department of that firm, a large (8) advertising agency, under the sponsorship of the Joint (9) Sports Claimants. Those studies essentially in 1978, (10) 1979, and 1980 included surveys of multiple system (11) operator programming and marketing executives.

Tribunal, but (6) there appeared to be some confusion by the Tribunal (7) regarding the stratification process and concerns in (8) that regard.

(9) Q And in the 1986 survey, moving to the next (10) set, what was done to address those concerns?

(11) A Well, Bortz & Co., which is – was the (12) following firm separated from BBC as of 1988, (13) conducted a survey for 1986. And in that survey, they (14) in large part utilized the same methodology as had (15) been used in 1983 by BBC. But they made a decision in (16) that proceeding to – or in that study to use a simple (17) random sample rather than a stratified random sample.

(18) And one of the reasons that they had – (19) they continued to state that a stratified random (20) sample was a valid approach and actually was the most (21) valid approach for making the projection to the (22) universe of royalties, but they felt that the use of (23) a simple random sample was something that they could (24) go ahead and do because they had found in the 1983 (25) study that results by strata were very consistent.

Page 946

(1) And therefore, the overall allocation that (2) you would receive from a simple random sample would (3) tend to be consistent with that that you would receive (4) from using a stratified random sample.

(5) Q Just to –

(6) ARBITRATOR FARMAKIDES: Could you clarify (7) that for me, please? When you talk of a stratified (8) survey there, how do you calculate the factor that you (9) have to use in order to stratify each level? Do you (10) know what I mean?

(11) THE WITNESS: Yes. That's – as has been (12) discussed earlier, the factor that is used – the (13) factor that was chosen to determine the stratification (14) was the royalty payments because that was the variable (15) that was intended to be projectable to. The basis on (16) which the stratification is determined is application (17) of the cum. square root of F rule.

(18) That was gone through in some detail.

(19) ARBITRATOR FARMAKIDES: So you used only (20) that formula?

(21) THE WITNESS: Yes, that's – to determine (22) the boundaries of the strata. Yes, that's correct. (23) And actually, that –

(24) ARBITRATOR FARMAKIDES: I'm sorry.

(25) THE WITNESS: That was done by Dr.

Page 947

(1) Bardwell in the 1983 study as well.

(2) ARBITRATOR FARMAKIDES: This is a (3) consistent procedure?

(4) THE WITNESS: Yes, it's done in the – all (5) of the stratified samples used by BBC and/or Bortz & (6) Co., that procedure was used throughout this process.

(7) ARBITRATOR FARMAKIDES: Thank you.

(8) BY MR. NEIMAN:

(9) Q And stratification is a tool that's used (10) regularly to make studies projectable to universe –

(11) A Yes. In fact, we use it in other studies. (12) I can think of a particular example where we are (13) interested in projecting advertising revenue per (14) subscriber for a cable network to the universe of (15) cable systems. Actually, local advertising revenue (16) that cable systems generate from selling advertising (17) on this particular channel and projecting that overall (18) ad revenue per subscriber to the universe of systems (19) that carries that channel.

(20) We used a stratified random sample in (21) conducting that study as well.

(22) Q Well, in 1986 when you didn't stratify but (23) used the random sample, how did that affect the (24) results?

(25) A Well, I think that the results, as you

Page 948

(1) might expect, are near the ELRA results from the 1983 (2) study, which also used a simple random sample; but (3) again showed an overall categorization and an overall (4) ranking of categories that was consistent with what (5) had been obtained in prior surveys in both of the 1983 (6) surveys.

(7) Q So you're saying that the – for example, (8) in the ELRA study, movies was about 25 in '83, and in (9) the '86 Bortz study, it was –

(10) A It was again about 25%.

(11) Q Okay. And how did the sports number in (12) the random sample in '86 compare to the sports number (13) in the stratified sample done by BBC in '83?

(14) A Well, comparing the sports number to both (15) the ELRA number, which was 35 – essentially 35.7 – (16) it increased to 38.5 in the

1986 study, and compared (17) to the BBC number from 1983 of 36.1.

(18) Q So when you – but when you did it in '86 (19) with a random sample, you came up with a higher number (20) for sports, is that right?

(21) A That's correct, yes.

(22) Q And now, the next survey that was done by (23) Bortz is in '89. In that survey, did you use a (24) stratification?

(25) A Yes, we did use stratification in that

Page 949

(1) study, and Mr. Bortz has discussed the 1989 study at (2) some length. But the return to stratification was (3) based on the notion that the stratification was the (4) most applicable approach to use in this specific (5) instance of attempting to project how royalty payments (6) would be allocated by cable operators.

(7) And also based on the notion that now six (8) years had passed since the 1983 study, and maybe we (9) could no longer be comfortable with the notion that (10) responses were likely to be fairly similar by strata.

(11) ARBITRATOR WERTHEIM: Is the reason why (12) several years are omitted along the way – for (13) example, between '83 and '86 – simply that there were (14) no Tribunal proceedings for those years?

(15) THE WITNESS: That's correct, to my (16) knowledge.

(17) BY MR. NEIMAN:

(18) Q Now in '89, Mr. Trautman, when you went (19) back to using stratified sample, which way did the (20) sports number go from where it had been in the '86 (21) random sample?

(22) A Well actually, the sports number went down (23) slightly. Again, have not done a test to tell whether (24) that was a statistically significant decline, but the (25) number did go down slightly. And the allocation to

Page 950

(1) movies increased slightly. Again, those two (2) categories remained ranked substantially higher than (3) the other categories, followed by – again, in the (4) same order as has been the case essentially since the (5) 1983 survey, followed by syndicated news and (6) devotional and PBS.

(7) Q Directing your attention on page 13 of (8) your report, you talk about some of the changes that (9) were made in the '89 – some of the other changes made (10) in the '89 study from

managers were (19) interviewed in that 1979 study?

(20) **A BBDO surveyed a random sample of 108 (21) system managers in that year. They were able to (22) complete responses with approximately half of those, (23) and a smaller amount answered the allocation question. (24) So it was a relatively small sample of system (25) managers.**

Page 940

(1) Q Now, given the relatively small sample, is (2) it surprising to see differences on the order of four (3) to five percent?

(4) **A No, I don't believe so.**

(5) ARBITRATOR WERTHEIM: Is that a small (6) sample?

(7) THE WITNESS: Well, I would say that's (8) not a terribly small sample, but the response rate is (9) somewhat low. And the response rate to the allocation (10) question, if you refer to page three of the report – (11) let's see is the figure is in here – actually on page (12) four under sample size and composition, 42 respondents (13) or 39% of the system sample responded to the (14) allocation question.

(15) ARBITRATOR WERTHEIM: Well, we've got (16) survey data presented by Mr. Bortz that in certain (17) strata as few as 45 or 49 respondents. Are you (18) suggesting that 42 is too few to produce reliable (19) data?

(20) THE WITNESS: Well, the Bortz survey is a (21) different methodology weighted by royalties. And (22) also, the survey is a survey of 180 to 190 to 200 (23) respondents. It is not a survey – each individual (24) strata contains a subset of that group, but the survey (25) is a survey of – on the order of 200 respondents.

Page 941

(1) BY MR. NEIMAN:

(2) Q To move on the to 1993 surveys, I can see (3) from your chart that there were two in 1983, one by (4) ELRA and one by BBC. Who sponsored the ELRA survey?

(5) **A The ELRA survey was sponsored by the NAB.**

(6) Q And the BBC survey?

(7) **A Was sponsored by the Joints Sports (8) Claimants.**

(9) Q Why don't you tell the panel about those (10) 1983 surveys?

(11) **A All right. In 1983, both the ELRA and BBC (12) surveys sought to make some modifications to build (13) upon the work that had been done in the BBDO surveys. (14) Both surveys included large samples. The ELRA survey (15) sample used a**

simple random sample and sampled 400 (16) cable systems and obtained responses from 286, I (17) believe. (18) The Bortz & Co. – or the BBC survey (19) included 182 systems in the sample and obtained (20) responses from 169, or a 93% response rate. The BBC (21) study also utilized a stratified random sample and was (22) designed to be not only statistically representative (23) of Form 3 cable systems, which the ELRA study was as (24) well; but also to be projectable through the use of (25) the weighting process to the Copyright Royalty

Page 942

(1) **payments that had been made by the universe of cable (2) systems.**

(3) Q Now this '83 survey, was this of – were (4) these of MSO's or system managers?

(5) **A These, in both instances, were surveys of (6) system managers. And the decision was made by BBC and (7) reported in their report that they felt that system (8) managers were those who were most responsible for (9) programming decisions at the local level and were the (10) appropriate respondent group. ELRA made the same (11) judgement and chose to interview system managers as (12) well.**

(13) Q And what were the results of these 1983 (14) surveys?

(15) **A Well, you see – you'll see that in 1983, (16) results again showed relatively higher allocations to (17) live professional and college sports and movies (18) categories with – in comparison with the other (19) categories. In 1983, for the first time, sports (20) received a larger allocation than did movies.**

(21) **And that result, I think, is consistent (22) with trends in the industry that were evident over the (23) 1980 to 1983 period. In its 1983 determination, the (24) Tribunal referred to a change in circumstances with (25) particular reference to the rapid emergence of super**

Page 943

(1) **stations as the primary form of distant signal (2) distribution over that 1980 to 1983 period.**

(3) **And in fact, accorded sports and increased (4) weight in the 1983 proceeding largely on the basis of (5) those – what they perceived to be changed (6) circumstances. It's my opinion that those same (7) changed circumstances contributed to the flip-flop, in (8) essence, of sports**

with movies.

(9) Q By that flip-flop, you're talking about (10) the place on your chart where the lines on the graph (11) cross? (12) **A Yes.**

(13) Q And that's the red line for sports and (14) blue line for movies?

(15) **A Yes.**

(16) CHAIRPERSON JIGANTI: Would you be (17) concerned with the accuracy of the surveys considering (18) both the movies and the syndicated programming having (19) differences of – excuse my mathematics – somewhere (20) between 15 and 20%? (21) THE WITNESS: 15 and 20%? In terms of –

(22) CHAIRPERSON JIGANTI: You go from 25 to 30 (23) with regard to the movies between ELRA and BBC, and (24) then syndicated programming going from 15 to 18. I (25) think that's somewhere around –

Page 944

(1) THE WITNESS: I see your calculation. No (2) – again, because each survey used a somewhat (3) different methodology. And I think that there may (4) have been slight differences in the results as a (5) result of that, although not major certainly. (6) CHAIRPERSON JIGANTI: That's a slight (7) difference in result, about 20%?

(8) THE WITNESS: I believe so, in this survey (9) at this time.

(10) CHAIRPERSON JIGANTI: – worth about \$5 (11) million dollars, I would imagine.

(12) THE WITNESS: Well, yes; I concur with (13) that. And I would not purport to say that – for (14) example, these figures are taken in the ELRA study to (15) the hundredth of a point. I would certainly not (16) purport to say that they are representative of – to (17) the hundredth of a point of what someone – what a (18) group of cable operators would allocate to sports or (19) that that should be the purpose or the use that's made (20) of these findings.

(21) I think that these are an indication of (22) the relative allocations that operators would make on (23) an aggregate basis.

(24) BY MR. NEIMAN:

(25) Q Mr. Trautman, were there criticisms

Page 945

(1) leveled in the 1983 proceeding about the weighting (2) used in the BBC 1983 survey?

(3) **A Yes, there were criticisms of the (4) weighting. Not necessarily criticisms that were given (5) weight in their determination by the**

study. But they (19) reflect addition of category definitions and/or (20) expansion of category definitions, giving the (21) respondent more time to consider their allocation, (22) asking them to write it down, asking to speak with the (23) individual most responsible for programming decisions.

(24) All of those changes were made in response (25) to prior criticisms that were evident and given some

Page 956

(1) weight by the Tribunal in the 1989 decision.

(2) CHAIRPERSON JIGANTI: Mr. Neiman, I (3) thought perhaps we could wait for a more logical time (4) to break, but I think we'd better break at this - (5) we'll go a little bit longer than usual. We have some (6) unfinished - it will be a 15 minute recess.

(7) (Whereupon, the proceedings went off the (8) record from 10:49 a.m. until 11:11 a.m.)

(9) CHAIRPERSON JIGANTI: Counsel, you may (10) proceed. Okay, we were discussing the chart. And we (11) didn't have any difficulty in the chart by itself, but (12) we did have - well, we'd like to have it reduced for (13) the purposes of the record so it's more (14) comprehensible.

(15) But one of the things is this chart. It (16) looks as though it's been made - wasn't made last (17) night at 10:00.

(18) And we think that really, in total (19) fairness, the parties should have had an opportunity (20) - counsel here, Mr. Stewart, Ms. Hand, have had a (21) heck of a time trying to read what's there, and even (22) counsel over here who have a better sight line still (23) are going to have a difficult time reading it. (24) So, it's something that bothered us (25) considerably. Please, at a break today, if you can

Page 957

(1) get it copied for counsel that they can refer to it (2) more readily, we think it would be much more fair.

(3) DIRECT EXAMINATION (continued)

(4) MR. NEIMAN: We'll do that, Your Honor. (5) Mr. Trautman, picking up where we left off, why don't (6) you tell the panel about the 1993 survey?

(7) THE WITNESS: Yes, the 1993 survey was (8) again done by Bortz & Co. That survey is referenced (9) on pages 23 and 24. And that survey essentially (10) replicated the methodology utilized in the 1992 study (11) and again found results that were consistent in terms (12) of the category rankings from highest to lowest, but

(13) again showed an increased allocation to sports and a (14) larger gap in the value shown between sports and movie (15) programming.

(16) ARBITRATOR WERTHEIM: Are you anticipating (17) or has it already been determined in some fashion that (18) there will be a 1993 proceeding?

(19) THE WITNESS: I am not aware of anything (20) in that regard.

(21) ARBITRATOR WERTHEIM: Well, I'm wondering (22) why you did one for '93 when at least as of yet (23) there's no proceeding for that year, whereas earlier (24) you omitted these surveys in years for which there was (25) no proceeding?

Page 958

(1) THE WITNESS: We were asked to conduct a (2) survey in 1993. In the years in which there was no (3) proceedings in prior years, we were not asked to (4) conduct a survey.

(5) BY MR. NEIMAN:

(6) Q Mr. Trautman, looking at that chart and (7) see how the red line for sports is going up from '91, (8) '92 and '93, is that consistent with your (9) understanding of what was going on in the industry?

(10) A Yes, I believe it is.

(11) Q And you also see that the blue line for (12) movies is declining over those years. Is that (13) consistent with your understanding of what was going (14) on in the industry?

(15) A Yes, it is.

(16) Q Turning your attention back to the 1983 (17) survey, I just want to clear up a point. Did BBC have (18) anything to do with the 1983 ELRA survey?

(19) A No, they did not.

(20) Q And did ELRA have anything to do with the (21) 1993 BBC survey?

(22) A With the 1983 BBC survey? No.

(23) Q Those were completely independent studies?

(24) A Yes.

(25) Q And they were sponsored by different

Page 959

(1) parties?

(2) A Yes.

(3) Q I also want to clear up something about (4) that - the 1990 study that was brought to our (5) attention. I believe you told me that you needed a (6) change of the confidence intervals for the 1990 study (7) as well?

(8) A Well, that's correct. The change that we (9) made in the summary table, there are no confidence (10) intervals shown on that table. But the - a change (11) should also be made in the

confidence intervals just (12) to keep the consistency in the change of results.

(13) Q If you turn to page -

(14) A Confidence intervals are actually shown on (15) page 31, and for that particular question.

(16) Q And would those changes be?

(17) A The confidence interval for sports would (18) be 3.0. For movies, would be 2.5. For syndicated, (19) would be 1.3.

(20) ARBITRATOR WERTHEIM:

Excuse me, which - (21) page 31 has -

(22) THE WITNESS: Page 31, the table - the (23) first table under question four, operator programming (24) allocation.

(25) ARBITRATOR WERTHEIM: And what was your

Page 960

(1) number for sports?

(2) THE WITNESS: 3.0.

(3) ARBITRATOR WERTHEIM: No, I'm sorry, for (4) movies?

(5) THE WITNESS: 2.5. For syndicated, 1.3. (6) For news, 1.6. For devotional, 0.6. And the other (7) two categories are unchanged.

(8) ARBITRATOR WERTHEIM: Is there any change (9) in question two with respect to confidence intervals?

(10) THE WITNESS: Yes, actually the numbers do (11) change for the other questions in the survey as well (12) in 1990 because that was not something that was (13) included in the summary table or that I was going to (14) be discussing in my direct. We did not read those (15) into the record. I can provide that information for (16) the other questions in 1990.

(17) MR. NEIMAN: What I thought we'd do, Your (18) Honor, is simply produce another page that would have (19) those numbers that you could insert into your (20) testimony. We'll move to do that.

(21) ARBITRATOR WERTHEIM: Are you going to do (22) that also with Table 1?

(23) MR. LANE: Before we -

(24) MR. NEIMAN: Well, I don't have the table (25) with me. I'm just proposing that as a way - rather

Page 961

(1) than having you copy down each number now.

(2) CHAIRPERSON JIGANTI: Well, as the (3) mechanics of it -

(4) MR. LANE: You'd have to read them into (5) the record now, Your Honor, so that we can have a (6) change to look at them if we want to cross him.

(7) CHAIRPERSON JIGANTI: Let's not confuse (8) the substance with the

what was done in 1983 and 1986. (11) Can you briefly summarize that for the panel?

(12) **A Yes.** In 1989 – well, there were a couple (13) of important changes. I think one is that the study (14) added – and this had also occurred in 1986 – added (15) additional program categories to represent the (16) devotional and Canadian climates. This had been done (17) by ELRA in their 1983 study, but the Bortz – or the (18) BBC study for 1983 had only included five categories (19) of programming, not the Canadian category and the (20) devotional category had not been included in the 1983 (21) BBC study.

(22) **Q** Let's talk about the next group of (23) surveys. Let's start with the 1990 survey. Tell us (24) about the 1990 survey.

(25) **A Well, the 1990 survey was executed by**

Page 951

(1) **Burke Marketing Research.** And that study utilized (2) essentially the same questionnaire that had been used (3) by Bortz & Co. in the 1989 study. It also used the (4) same sample that had been drawn for the 1989 study. (5) That's on page 17.

(6) **Q** And how did the results in the 1990 study (7) compare with the results in previous years?

(8) **A Again, the results were generally (9) consistent, particularly in the ranking of the (10) different categories with the findings from prior (11) years.**

(12) **Q** And is the percentage of allocation to (13) sports basically consistent with what it was in prior (14) years?

(15) **A Yes, the percentage allocation of 37% (16) compares with a range of 36-38% that had been (17) experienced in the previous years, and the 34 is (18) slightly higher than the 34% that was experienced in (19) 1989.**

(20) **Q** And were the movies and syndicated (21) allocations also consistent basically?

(22) **A Again, yes, generally consistent. The (23) movies category being ranked at approximately 30%, as (24) was consistent with other studies that utilized this (25) stratified sample. I think that it's also important**

Page 952

(1) **in the 1990 study – the same questionnaire (2) essentially was used.**

(3) **And if you turn to page 18, you**

can see (4) that in the paragraph discussion of criticisms, that (5) the criticisms related to the questionnaire can (6) largely – although there has not been a proceeding (7) surrounding the 1990 proceeding – could largely be (8) considered similar to those criticisms that had been (9) applied in 1989.

(10) **There were also – I think it's important (11) to note – are questions as to whether using the same (12) sample that had been drawn for the 1989 study was an (13) appropriate methodology, and are also certain issues (14) that suggested there may have been certain (15) administrative problems in the execution of the (16) survey.**

(17) **Q** And when you look at the overall results (18) of that 1990 survey, they're generally consistent with (19) the results in prior years?

(20) **A Yes, they are. Moving to the 1991 survey, (21) this survey was again executed by Bortz & Co. It was (22) conducted prior to the release of the final (23) determination from the 1989 survey. And therefore, a (24) virtually identical methodology to that which had been (25) used in the 1989 survey was employed.**

Page 953

(1) **A stratified random sample selected (2) specifically for 1991, inclusion of the seven (3) categories of programming – and in that study, 221 (4) systems were sampled. Interviews were completed with (5) 198 or approximately 89%. And again, allocations were (6) received. Again, consistent in terms of ranking with (7) the allocations obtained for the categories in (8) previous studies.**

(9) **And you begin to see the beginnings of (10) what appears to be a widening gap between the (11) allocations to the sports and movies categories in the (12) recent studies.**

(13) **ARBITRATOR WERTHEIM:** Do you have any (14) explanation of the changes in the figures for (15) syndicated shows and series? I see, for example, that (16) beginning roughly 80 – that's riding above the level (17) for news, but then in 1990, it comes down again. But (18) then it turns upward bound very slightly. Anything in (19) particular that was going on in the industry during (20) those periods that would help explain that?

(21) **THE WITNESS:** Well, I think that in these (22) – beginning in the 1978 study, you start essentially (23) from

this point for syndicated with the change in (24) methodology from '78 to '79 in the BBDO study. I (25) believe – I don't believe that there – the variation

Page 954

(1) that you see over this time period, I would say that (2) that would be attributable – they're very mild (3) fluctuations.

(4) I would say that that would be (5) attributable generally to just the fact that you're (6) conducting different surveys with different samples in (7) different years.

(8) **ARBITRATOR WERTHEIM:** But were you (9) consistently at a wider gap by all the surveys between (10) roughly '83 and '89 than we've had since then?

(11) **THE WITNESS:** A wider gap?

(12) **ARBITRATOR WERTHEIM:** A wider gap between (13) the syndicated and news –

(14) **THE WITNESS:** Between the syndicated and (15) news categories? Yes, you did. And I think that I (16)

would say that in recent years, some of the changes in (17) the industry relating to increased availability of (18) stronger syndicated product on some of the cable (19) networks – for example, what you've seen since the (20) late 80's and approximately 1990, is that cable (21) networks have begun to buy what are known as off (22) network series, particularly hours programming. (23) An example would be Murder, She Wrote, if (24) you're familiar with that series at all, that were (25) relatively high profile syndicated series that

Page 955

(1) typically in the past had gone to local broadcast (2) stations and not to cable networks.

(3) And in the more recent years, those types (4) of series have begun on an increasing basis to go to (5) cable networks such as USA and Lifetime. And I would (6) say that over the course of that period, that that may (7) have had an impact on the syndicated category, at (8) least in its relationship to news.

(9) **BY MR. NEIMAN:**

(10) **Q** The methodology for this '91 survey is (11) basically the same as the '89 survey?

(12) **A That's correct. Virtually identical.**

(13) **Q** And then in '92, for the first time – (14) strike that. In '92, in response to the '89 decision, (15) a few changes were made?

(16) **A Yes, and those changes actually are (17) included in the testimony of Mr. Bortz and are not (18) addressed specifically in this**

reliability in the results.

(22) Q One more slight correction, Mr. Trautman. (23) Looking at the 1983 - on Exhibit 7, the entry for the (24) devotionals is in the BBC column. Should that be in (25) the ELRA column?

Page 967

(1) **A Yes, that's correct.**

(2) Q And is that in Exhibit - on page vi?

(3) CHAIRPERSON JIGANTI: I missed your -

(4) MR. NEIMAN: I'm sorry, why don't you just (5) illustrate that on the chart.

(6) THE WITNESS: Yes, the report is correct (7) in this regard throughout. The devotional claimants (8) were not included in the BBC survey in 1983. They (9) were included in the ELRA survey, so this point should (10) actually be up here above -

(11) ARBITRATOR WERTHEIM: Is that going to be (12) corrected on the reduced size copy that you provide (13) us?

(14) MR. NEIMAN: We'll mark it on that copy, (15) Your Honor.

(16) BY MR. NEIMAN:

(17) Q Summarize the conclusions that you've (18) drawn from your study of the cable operator surveys (19) over this time period.

(20) **A Well, I think that what the series of (21) surveys show over the history of constant sum surveys (22) submitted in this proceeding is that there is a (23) consistent pattern of the highest - the largest (24) amount of the value of distant signal programming (25) being allocated to the movies and sports categories -**

Page 968

(1) **that there is general consistency in the allocations (2) to - and relative rankings of the various categories (3) in that over the course of the studies, consistent (4) with my experience and what I would have expected to (5) find, there has been a general relative increase in (6) the value of sports assigned by cable operators in (7) comparison with the value assigned to movies.**

(8) MR. NEIMAN: I have nothing more for the (9) witness at this time.

(10) ARBITRATOR WERTHEIM: I'm sorry, you said (11) relative increase in the value of sports in comparison (12) with what?

(13) THE WITNESS: The value assigned to (14) movies.

(15) CHAIRPERSON JIGANTI:

Counsel, how many (16) counsel are going to - well, do you have any (17) agreement as to who's going to

proceed first with Mr. (18) Trautman?

(19) MR. HESTER: Your Honor, I think we've (20) agreed that I would go first.

(21) CHAIRPERSON JIGANTI: Okay.

(22) CROSS EXAMINATION

(23) BY MR. HESTER:

(24) Q Good morning, Mr. Trautman.

(25) **A Good morning.**

Page 969

(1) Q My name is Timothy Hester. I represent (2) the Public Television Claimants. Let me begin by (3) going to this Exhibit 7 that you've been discussing, (4) and I guess I'd like to refer you to the document in (5) text of your report, Table 1, if I could. And I am (6) really not interested in talking about what I would (7) call the top part of this Exhibit 7, the allocations (8) between sports and movies.

(9) I wanted to focus on the PBS entries, if (10) I could. Am I right in looking at the line that runs (11) across the page in Table 1 for PBS that there are (12) three studies shown here for - the studies for 1979 (13) and 1980 that were based on attitudinal surveys of (14) managers of - and operators of cable systems?

(15) **A Yes, system managers and executives and (16) multiple system operators.**

(17) Q And in those surveys, was there any (18) automatic assignment of a zero value to PBS (19) programming if the given operator had not actually (20) carried a PBS signal during the survey year?

(21) **A No, in those studies, respondents were not (22) asked - were not given specific information as to the (23) signals they actually carried. And therefore, all (24) respondents - at least in part, because of that, all (25) respondents were asked to assign a value to the PBS**

Page 970

(1) **category.**

(2) Q And so, am I right that the first year (3) where the automatic assignment of a zero value to PBS (4) kicks in is with the 1983 studies?

(5) **A Yes.**

(6) Q And if you look at the results going (7) forward from 1983 for PBS, for each of those survey (8) years, there was an automatic assignment of a zero (9) value for PBS if the system had not actually carried (10) a PBS distant signal?

(11) **A That is correct.**

(12) Q And that's a point you make in your write (13) up, correct - you identify this throughout as a (14) deficiency or a methodological problem of the studies

(15) as they relate to PBS?

(16) **A Well, that was a methodological approach (17) that was selected with respect to each study. That's (18) correct.**

(19) Q And it's something that - so for all of (20) the results, 1983 forward, there's the same issue (21) presented that PBS has automatically been assigned a (22) zero value?

(23) **A That's correct.**

(24) ARBITRATOR WERTHEIM: Does that have any (25) relation to the apparent fact that the results for PBS

Page 971

(1) were noticeably higher in all the years prior to '83 (2) than they have been since then?

(3) THE WITNESS: Yes, it clearly does. In (4) the instances - and I think particularly with the MSO (5) surveys that you would expect that essentially within (6) their group of systems, all MSO's, I would venture to (7) say, do carry some - do operate some systems that do (8) carry PBS signals. And therefore, it was certainly (9) appropriate in an MSO study to have them consider the (10) PBS category. (11) But any time you have a methodology which (12) asks all respondents to value something and compare it (13) to a methodology that assigns a zero value in (14) instances where they did not carry a specific type of (15) signal, I would expect that you would find a (16) difference in the allocation to that category.

(17) Now, we have seen in the surveys conducted (18) by BBC and Bortz & Co. that among the group of systems (19) that do carry PBS signals, they allocate a relatively (20) high value to those signals. I can't cite the (21) specific numbers, but it's generally in the range of (22) 10%.

(23) BY MR. HESTER:

(24) Q And so your point is that for those (25) systems that do elect to carry PBS, they tend to place

Page 972

(1) a relatively high value on that signal, but there are (2) many other systems that don't carry it to which an (3) automatic zero value is assigned?

(4) **A That's correct.**

(5) Q Looking at the figure shown for the 1986 (6) study - there's a Bortz & Co. study that was done in (7) 1986. Do you see that?

(8) **A Yes.**

(9) Q Was that study prepared in a year where (10) there was a settlement of the proceeding?

(11) **A Yes, it was.**

(12) Q And was there a litigated

form here. Now are we talking (9) about substance as far as changing of these figures, (10) and are you making the motion to amend question four (11) on page 31?

(12) MR. NEIMAN: Yes, Your Honor.

(13) CHAIRPERSON JIGANTI: And you're asking us (14) to amend it by putting in the numbers that you have – (15) just have been read into the record?

(16) MR. NEIMAN: Yes, Your Honor.

(17) CHAIRPERSON JIGANTI: All right, is there (18) any objection to that?

Hearing no objection, the (19) motion to amend will be allowed. Now, as a question (20) to form, you will submit an amended page 31, and will (21) you submit an amended roman numeral six also?

(22) MR. NEIMAN: Yes, Your Honor.

(23) CHAIRPERSON JIGANTI: Okay, Mr. Lane, you (24) have some kind of –

(25) MR. LANE: My understanding now is that

Page 962

(1) there are changes to question two at the bottom of (2) page 31, and I don't know if there are changes on page (3) 32 as well.

(4) MR. NEIMAN: Yes, there are.

(5) MR. LANE: And that's what I'm relatively (6) concerned about because we're going to have to – we (7) don't know what those changed numbers are.

(8) MR. NEIMAN: Well, Your Honor, we (9) disclosed this when we provided the data to Mr. Lane. (10) He should know what the numbers are. We produced them (11) to him.

(12) CHAIRPERSON JIGANTI: Well, he might know (13) it, but we don't know it. And I'd like to know what (14) your amendments are.

(15) MR. NEIMAN: Okay, I'll have the witness (16) –

(17) CHAIRPERSON JIGANTI: – amendment to (18) question two, if you can do it now. It's your case. (19) You do it now or you do it anytime you want. As it (20) stands right now, question number four has been (21) amended. That's the only thing that's been amended, (22) the only motion that's been allowed. You try your (23) case, you do it as to the other exhibits when you see (24) fit.

(25) MR. NEIMAN: Your Honor, I'll have the

Page 963

(1) witness read in the rest of the changes for the (2) 1990– into the record, and then I'll move to have (3) those amended.

(4) CHAIRPERSON JIGANTI: Okay.

(5) MR. NEIMAN: Why don't you go ahead.

(6) CHAIRPERSON JIGANTI: Go ahead.

(7) THE WITNESS: All right, on question two, (8) immediately below question four, the changes in the (9) percent allocation column should be sports 70.5; (10) movies 43.3; syndicated unchanged; news 14.7; PBS 1.7; (11) Canadian 0.4; devotional unchanged; and other 1.7. (12) The change in the confidence interval – sports 10.1; (13) movies 10.6; syndicated 9.1; news 7.7; PBS 3.0; (14) Canadian 0.8; devotional unchanged; and other 3.0.

(15) MR. NEIMAN: Go ahead.

(16) THE WITNESS: On page 32 at the top, (17) question 3A, percent allocation to yes, 32.5; to no, (18) 67.5; and the confidence intervals should read 9.6.

(19) Question 3B, 3C – the percent allocation to sports in (20) unchanged; to movies is 55.8; to syndicated is 18.6; (21) to news is 13.7; to PBS is 2.2; devotional is (22) unchanged; Canadian is unchanged; other is 4.8.

(23) The confidence intervals – sports is (24) 11.6; movies 21.0; syndicated 15.9; news 12.3; PBS (25) 2.9; devotional 0.3; Canadian unchanged; other 3.9.

Page 964

(1) Question 3D – sports 69.0; movies 20.0; syndicated (2) 7.0; PBS 1.2; news, devotional and Canadian all (3) unchanged; other 1.2; don't know, no response 1.6.

(4) Confidence interval – sports 20.0; movies (5) 18.1; syndicated 11.6; PBS 2.1; news, devotional and (6) Canadian all unchanged; other 2.1; and don't know, no (7) response 2.6.

(8) ARBITRATOR WERTHEIM: Mr. Trautman, are (9) you – or maybe I should ask counsel – on page 31, (10) the percent allocations shown for question number (11) four, are you requesting that they should also be (12) changed to conform with the changes made in your Table (13) Number 1?

(14) MR. NEIMAN: Yes, Your Honor.

(15) THE WITNESS: Yes.

(16) CHAIRPERSON JIGANTI: Do you have a motion (17) to amend the matters that Mr. Trautman just read into (18) the record?

(19) MR. NEIMAN: Yes, Your Honor.

(20) CHAIRPERSON JIGANTI: Any objections? No (21) objection, the motion will be allowed. As to matter (22) of form, you will submit a corrected page 31, and you (23) will submit also a correct page roman numeral six.

(24) MR. NEIMAN: And also a

corrected page 32, (25) Your Honor.

Page 965

(1) CHAIRPERSON JIGANTI: And I'm sorry, –

(2) THE WITNESS: I believe that page 17 also (3) shows the percent allocation that is in the summary (4) table for the year 1990.

(5) CHAIRPERSON JIGANTI: As a matter of form (6) then, you will change all those three pages.

(7) MR. NEIMAN: That's right, Your Honor.

(8) CHAIRPERSON JIGANTI: Roman numeral six, (9) 17 and 31, 32.

(10) MR. NEIMAN: And we'll also move to amend (11) 17 to be in accord with roman numeral six.

(12) CHAIRPERSON JIGANTI: Any objections? No (13) objection, the motion is allowed.

(14) BY MR. NEIMAN:

(15) Q Now, Mr. Trautman, all those changes that (16) we just made, are those related only to the 1990 (17) survey?

(18) **A Yes, they do.**

(19) Q And you don't have to make any changes to (20) the 1991 survey?

(21) **A No.**

(22) Q Or to the 1992 survey?

(23) **A No.**

(24) Q Looking, Mr. Trautman, at the chart as a (25) whole again, do you find a general consistency of

Page 966

(1) results?

(2) **A Yes, I do find a general consistency of (3) results, particularly since the 1983 proceeding. And (4) again, the changes that occurred between 1979 and 1983 (5) in the results, I would also find specifically for the (6) movies and sports categories to be consistent with my (7) experience. (8) But the results since that time, I would (9) view in a market research context such as this to be (10) generally consistent.**

(11) Q And when you have survey methodology that (12) achieves this kind of consistency over a ten year (13) span, in your experience, does that say something (14) about the reliability of the method?

(15) **A In my opinion, when you select different (16) samples, use somewhat, although not substantially (17) different methodologies, and obtain results in (18) different years but over relatively close period of (19) time and obtain results on the order of those obtained (20) here, that illustrates that you have a high degree of (21)**

your experience that those cable (24) operators that did in fact carry a PBS signal gave it (25) a relatively high weight. Do you recall that?

Page 978

(1) **A Yes.**

(2) Q And are these figures that are reflected (3) in Exhibit 2X consistent with that observation?

(4) **A Yes, they are.**

(5) Q And indeed, they reflect the number of (6) instances where cable operators that carried a PBS (7) signal gave it a weighting as high as 20 or sometimes (8) even 30% of the total value of the programming that (9) they carried on a distant signal basis?

(10) **A That's correct.**

(11) ARBITRATOR WERTHEIM: Or even 60%.

(12) MR. HESTER: That's my favorite system, (13) Your Honor.

(14) (Laughter.)

(15) BY MR. HESTER:

(16) Q I wanted to ask you about the 60% (17) weighting shown there, and let me ask for purposes of (18) comparison to have you look at observations 24 and 25 (19) on the page for the 1992 survey. Do you see in (20) observation 25 that that cable system ranked PBS (21) programming as having 60% of the value of the distant (22) signals it carried?

(23) **A Yes.**

(24) Q And cable operator 24 ranked PBS at 5%, do (25) you see that?

Page 979

(1) **A Yes.**

(2) Q Would you agree with me that that (3) difference between cable systems is fully consistent (4) with what one might expect to see that some cable (5) operators would value a given type of programming more (6) heavily than another type of programming?

(7) **A Yes, it is. We don't have other (8) information in this table about those individual (9) systems. But I think - I could think of a specific (10) example of a situation where that might be highly (11) logical. And this is just for illustrative purposes, (12) but for example, system 25 might carry one super (13) station and a PBS station and no other distant (14) signals.**

(15) In that instance, it would be quite - and (16) perhaps would fall in a market in which they had no (17) local PBS signals and had to import one in order to (18) have any PBS programming in the market whatsoever. In (19) that instance, it would be quite logical that of the (20) programming contained on both

signals, that that (21) operator would allocate half or more of the value to (22) a program type or signal, in this case, in the case of (23) PBS such as PBS.

(24) The example for system 24, again (25) illustratively, and this is somewhat more common,

Page 980

(1) would be a situation where the PBS distant signal was (2) carried in conjunction with a number of other distant (3) signals, perhaps three, four. And in that instance, (4) it would be likely that the weight assigned to the PBS (5) station would be proportionately lower.

(6) And it is also possible in that market (7) that there was already a local PBS signal. We find a (8) number of instances where distant signals may be (9) imported into a market even though there is already a (10) public television station available locally in that (11) market.

(12) Q And let me ask you to go back to your (13) discussion of observation 25 here. Why, in your (14) judgement, would it be reasonable to expect that a (15) cable operator in your hypothetical that did not have (16) a local distant - local public television signal - (17) why, in your judgement, would that cable operator (18) plausibly assign a very high value to public (19) television programming?

(20) **A Well, we have done quite a bit of work (21) with public broadcasters in the past, and with public (22) broadcasting on a national basis. And I am aware that (23) cable operators in this survey are looking at (24) assigning value to programming which has value in the (25) tracking and retaining subscribers.**

Page 981

(1) And consistently, in subscriber (2) satisfaction surveys and customer satisfaction surveys (3) (it's the same thing, a different term), we find that (4) PBS programming is often given high value by (5) consumers. They consider it to be important (6) programming that they would like to have. And in a (7) situation where -

(8) ARBITRATOR WERTHEIM: Consumers, you're (9) talking about viewers or you're talking about systems?

(10) THE WITNESS: I'm talking about (11) subscribers to systems. And it's interesting, because (12) typically public television gets a much higher value (13) rating by subscribers and consumers, in my experience, (14) than

would ever be reflected in this viewing levels.

(15) But to continue the discussion or the (16) example, where a cable operator was positioned to (17) provide something unique that would not otherwise be (18) available in the market, that would tend to be by the (19) cable operator, in my experience, valued very highly, (20) particularly when it's programming that his (21) subscribers really want and find value in.

(22) So his ability to import a distant signal (23) where there otherwise was not one would very likely (24) result in him giving it a very high value. I would (25) say the only reason this doesn't occur more often is

Page 982

(1) you, in most cases now, have PBS stations covering the (2) vast majority of households in the country.

(3) So there is only a few markets in which (4) there is not a local PBS station.

(5) ARBITRATOR WERTHEIM: Do you know (6) approximately how many markets that is?

(7) THE WITNESS: I know that the reach - and (8) again, I'm approximating - the reach of, I believe, (9) all public television signals is close to 97% of the (10) country. But for the purposes of whether it's (11) assigned to a local market or not as defined by this (12) proceeding, I would believe that the percentage is (13) probably lower, but I can't answer that question (14) directly.

(15) ARBITRATOR WERTHEIM: Has there been any (16) material change in that regard to the period we're (17) concerned with or compared to the present situation?

(18) THE WITNESS: Material change in the (19) availability of PBS?

(20) ARBITRATOR WERTHEIM: Yes.

(21) THE WITNESS: I would say in general the (22) availability of PBS signals off the air has probably (23) increased somewhat over the period from 1979 to 1993, (24) but I'm not closely familiar with that situation.

(25) ARBITRATOR WERTHEIM: And you don't have

Page 983

(1) any data on the number of local PBS stations during (2) this period?

(3) THE WITNESS: I know that the number has (4) grown significantly, but many of those signals overlap (5) with each other. So that cannot be translated (6) directly into coverage.

(7) MR. HESTER: Your Honor, in our direct (8) case we have presented and

decision in that (13) year with respect to that survey year?

(14) **A No, there was not.**

(15) Q So was there any formal judgement made (16) about the need for adjustments to that survey as it (17) related to PBS?

(18) **A No, the citing in my report of a criticism (19) was simply assuming that the same criticism would have (20) been made that had been made in other years.**

(21) Q Right. So the automatic zero criticism (22) could have been applied in that year as with respect (23) to the other years, 1983 forward?

(24) **A That's correct.**

(25) Q Okay. Let me hand to you - give copies

Page 973

(1) to the panel what we've marked as PBS Exhibit 2-X. (2) And I should note for the record that this same (3) document is also included in PBS's direct case as PTV (4) Exhibit 38, but I did want to mark it separately as an (5) examination exhibit since I wanted to discuss it with (6) Mr. Trautman.

(7) Mr. Trautman, have you seen this document (8) before?

(9) (Whereupon, the above- (10) referenced document was marked (11) as PBS Exhibit 2-X for (12) identification.)

(13) **A Yes, actually I believe that I have.**

(14) Q And could you describe generally what it (15) is, please?

(16) **A This is a listing of the system by system (17) responses to the question four allocation question for (18) each year from 1990 to 1992 studies. I would make one (19) correction, that the 1990 survey is not a Bortz (20) survey. It's a Burke survey. But that this data (21) reflects the system by system responses for the (22) systems which carried a PBS signal.**

(23) Q So if we - maybe it would be easiest to (24) focus on the third page, the 1992 study that Mr. Bortz (25) discussed yesterday. If we look at the first line

Page 974

(1) entry, could you just explain what that line entry is? (2) There's a number one in the left - on the left side (3) of the page, and then there are figures shown for each (4) of the programming categories.

(5) And could you just explain for the panel (6) what this is?

(7) **A Yes, that would be for a particular (8) respondent to the questionnaire. That individual, in (9)**

responding to question four, assigned a value of 50% (10) to movies, 30% to sports, 10% of their program budget (11) to syndicated, 5% to news, 5% to PBS, 0% to (12) devotional, and the zero in the Canadian column may (13) reflect a zero value allocation to Canadian, or the (14) fact that they didn't carry a Canadian signal and were (15) not asked about that category.

(16) ARBITRATOR WERTHEIM: Is there any (17) significance to the numerical order in which these (18) systems are listed, one through 31? (19) THE WITNESS: Not to my knowledge.

(20) BY MR. HESTER:

(21) Q And so just again, by way of contrast or (22) to take another example, if you look at what is listed (23) here as number 11, perhaps you could explain what the (24) observations are as to that one?

(25) **A Yes. System 11 on this list assigned a**

Page 975

(1) value of 5% to movies, 30% to sports, 5% to (2) syndicated, 25% to news, 30% to PBS, and 5% to (3) devotional programming. And again, a zero to (4) Canadian.

(5) Q And the total 100 shown at the right-hand (6) side, that's a 100%?

(7) **A That's right. They were required by the (8) nature of the question to assign values that totalled (9) to 100%.**

(10) ARBITRATOR WERTHEIM: Excuse me, are these (11) - these are all unweighted figures, are they?

(12) THE WITNESS: That's correct.

(13) BY MR. HESTER:

(14) Q And all of the figures that are shown here (15) are in percentage terms I take it?

(16) **A That's correct.**

(17) Q And so, the average shown here for PBS on (18) the 1992 survey - again, this is an unweighted (19) average, is that right?

(20) **A Yes, that's correct.**

(21) Q And it shows as an unweighted average (22) 13.71. Could you explain what that means as an (23) unweighted average?

(24) **A Yes. If you simply take the sum of all of (25) the 31 responses for PBS in that column and divide**

Page 976

(1) that figure by the number of systems, 31, you will get (2) that weighted average of 13.71%. And that reflects (3) the unweighted average value or percentage of their (4) programming that these systems

assigned to PBS.

(5) Q I believe you might have misspoken in your (6) answer. This is an unweighted average, the 13.7?

(7) **A Yes, it's an unweighted average.**

(8) Q Okay. And the weighting, could you just (9) describe generally how the weighting would be carried (10) out and how it would affect the averages shown here?

(11) **A Well, there are two weights that would be (12) applied to these results in factoring them into the (13) overall results. First, there would be an (14) identification of which strata - within which strata (15) each of these systems fell. And that system would be (16) - receive a weight factor that was appropriate to the (17) strata that it was in.**

(18) For example, in strata one, I believe in (19) 1992 one of every 20 systems was sampled; and (20) therefore, a weight reflecting that sampling (21) proportion - in other words, that system would be (22) given - would be weighted by a factor of 20 to (23) account for the sampling proportions. Whereas in (24) strata four, since all of the systems were sampled, (25) that system would be given a weight of only one in

Page 977

(1) terms of - or of only relative to its proportion - (2) its representation of the total group in the universe (3) of strata four systems.

(4) Then the second weighting process that (5) goes into the question for calculation is to take the (6) royalty that is paid by that individual system and to (7) weight the response again by the actual royalty that (8) they paid proportionate to the total royalties in each (9) strata.

(10) Q Let me ask you -

(11) **A Let me just finish that answer.**

(12) Q Sure.

(13) **A The result is that, for example, in strata (14) one, if 17 or 18% of all royalties paid in the (15) universe of systems into the copyright are accounted (16) for by systems that fall into strata one, then our (17) eventual weighting would assign 17.6% or 17% of the (18) value as 17% weight to all of the systems that we have (19) in our sample in strata one in order to be consistent (20) with the distribution of the royalties paid in by (21) systems in the universe.**

(22) Q Now earlier you had made the observation (23) that you have seen in

PBS. The same thing with (21) devotionals or Canadians. There are many people who (22) simply get into a cable system merely to enhance the (23) local signal period except for devotional, Canadian, (24) PBS or sports.
(25) THE WITNESS: Well, and I think you're

Page 989

(1) seeing that here in this particular system that is (2) allocating extremely high value to PBS. I would again (3) venture to say, although I don't have the data to (4) support it, but it's likely that that is a market (5) which does not have a local PBS station.

(6) BY MR. HESTER:

(7) Q And let me circle back briefly to the (8) discussion yesterday about a cable operator that might (9) have assigned 100% of the value of its distant signal (10) programming to sports. You recall that discussion (11) yesterday –

(12) A Yes.

(13) Q – during the testimony of Mr. Bortz? Is (14) that also consistent with what you would expect to see (15) in a survey of this type that there might be one (16) particular category such as sports that would receive (17) a very high value?

(18) A Yes, I believe that is consistent.

(19) Q Now –

(20) A It's an unusual response, but I believe (21) it's consistent with the process that we're asking (22) someone to do, and I believe that in the programming (23) marketplace, we certainly know that it's possible to (24) spend a lot of money on one particular group of (25) programs and fill the rest of the channel with

Page 990

(1) programming that costs little or nothing.

(2) Q And so now focusing back again on the PBS (3) responses, is it fair to say that what you're (4) observing in these data is that those operators that (5) have carried PBS as a distant signal place a quite (6) high value on it, and yet you have other operators (7) that haven't carried PBS at all as a distant signal, (8) and that's really what your survey is picking up, that (9) there's a high value placed on it by those who carried (10) it as a distant signal and others who did not carry it (11) as a distant signal haven't been asked to place a (12) value on it at all?

(13) A That's correct.

(14) Q Now again, focusing on the 1992 page here (15) in Exhibit 2X, this shows

31 cable systems that gave (16) a response as to PBS, is that right?

(17) A Yes.

(18) Q And – let me move this pretty chart. (19) What I wanted to do is just run through the three (20) years, if I could, and have you give me what the (21) numbers are for the three years. Let's see, for – I (22) guess I will do it this way, 1990. And I wanted to (23) have you give me what the numbers would be of the PBS (24) respondents and then the total number of survey (25) respondents for each year.

Page 991

(1) So, I'll help you try to fill this in. (2) For 1992, I take it we see 31 cable operators that (3) gave a response as to PBS.

(4) A Yes.

(5) Q And in 1992, how many total responses did (6) you receive to question four on the survey?

(7) A Actually, I believe that figure is in Mr. (8) Bortz' testimony.

(9) Q I think it is.

(10) A I believe the number is 179.

(11) Q I have 179 in my notes. Does that sound (12) right to you?

(13) A That sounds right to me.

(14) Q And that's a figure that's reflected in (15) Mr. Bortz' testimony?

(16) A Yes.

(17) Q Okay. And for 1991, the systems gave a (18) response as to PBS – is that number 40?

(19) A Yes.

(20) Q And the total number of systems that gave (21) a response in 1991 is what?

(22) A Is 196.

(23) Q Okay, and the comparable numbers for 1990 (24) – first we have 22 systems that gave a response as to (25) PBS?

Page 992

(1) A Yes. And 173.

(2) Q 173 systems gave a response to question (3) four on the survey?

(4) A Yes, that's correct.

(5) Q So if I do some subtraction here, and (6) again let's focus on 1992, roughly speaking it's in (7) the range of 148 cable systems that did not carry a (8) PBS signal that were included in your survey?

(9) A Yes.

(10) Q And so for each of those 148 systems under (11) your methodology, there was an automatic assignment of (12) a zero value?

(13) A That's correct.

(14) Q So there were 31 that gave a response as (15) to PBS and 148 to whom was – a zero value was (16) assigned?

(17) A That's correct.

(18) Q And again, same exercise for 1991 that (19) would be 156 of the survey respondents would have been (20) assigned a zero value for PBS automatically?

(21) A Yes, that's correct.

(22) Q And for 1990, it would be what, 151 –

(23) A I believe so, yes.

(24) Q – survey respondents who have been (25) assigned an automatic zero value? Maybe I'll label

Page 993

(1) this as zero value.

(2) A Yes.

(3) Q Okay, those were all the questions I have. (4) Thank you.

(5) MR. HESTER: Your Honor, I propose to try (6) to reduce this to 8 1/2 by 11 form again for ease of (7) the record.

(8) CHAIRPERSON JIGANTI: All right. I don't (9) make some disagreement. It's up to you as to whether (10) that's – maybe that's no different than a blackboard (11) that you can erase.

(12) MR. HESTER: Okay.

(13) CHAIRPERSON JIGANTI: But that's up to (14) you. If you want to –

(15) MR. HESTER: Okay.

(16) CHAIRPERSON JIGANTI: We'll at this time (17) recess for lunch. We'll resume again in one hour.

(18) (Whereupon, the proceedings recessed for (19) lunch at 12:07 p.m.)

Page 994

(1) A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(2) (1:13 p.m.)

(3) CHAIRPERSON JIGANTI: Any objections to (4) admission?

(5) MR. HESTER: Are we on the record now? (6) You got my motion on the record? I would move on the (7) record for the admission of PBS Exhibit 2-X, which was (8) discussed during the examination of Mr. Trautman.

(9) I should say that this is, as I mentioned (10) before, also an exhibit to the Public Television case, (11) but since Mr. Trautman is actually the person most (12) familiar with these data, I thought it would be (13) appropriate to have this submitted as an examination (14) exhibit that he sponsors.

(15) CHAIRPERSON JIGANTI: Any objection? It (16) will be admitted.

(17) MR. SATTERFIELD: Kendall Satterfield for (18) the Canadian Claimants.

(19) CHAIRPERSON JIGANTI: Pardon me?

(20) MR. SATTERFIELD: Kendall Satterfield for (21) the Canadian Claimants.

will present during the (9) hearing testimony on the percentage of distant signal (10) carriers that results in a cable operator having (11) either its first and only or second and only distant (12) – I'm sorry, first and only public television signal (13) on via distant signal retransmission.

(14) In other words, we will have evidence (15) showing the number of instances in which cable systems (16) secure public television programming only via distant (17) signal. We will also have evidence on the proposition (18) that when a cable operator imports a distant public (19) television signal and already has a local signal, that (20) there are differences in the programming mix that (21) result from that.

(22) This is not pure duplication. But that (23) will be part of our direct case.

(24) ARBITRATOR WERTHEIM: Thank you.

(25) ARBITRATOR FARMAKIDES: Can I please ask

Page 984

(1) a question in that regard? Assuming that a subscriber (2) has a cable system in his home merely because it (3) enhances the local stations except for one fact, and (4) that is that he likes the public broadcasting signal (5) that comes in, how would that be reflected on your (6) chart?

(7) THE WITNESS: The signal that's imported?

(8) ARBITRATOR FARMAKIDES: Yes. In other (9) words, he doesn't care about any other signals. He (10) doesn't care about sports, he doesn't care about (11) syndications, he doesn't care about news or the (12) Canadians or the devotional. He does care about the (13) PBS station. How would that be reflected on your (14) chart?

(15) THE WITNESS: Well, you remember that our (16) survey is directed toward cable operators, so we're (17) not serving subscribers. So our survey would not (18) directly reflect the opinion of an individual (19) subscriber. But to the extent that in a market that (20) is the case where among the distant signals the PBS (21) signal has a lot of interest among subscribers, I (22) would believe it would be likely that the operator (23) would recognize that value and accord it a relatively (24) high weight.

(25) If it were the only signal that were

Page 985

(1) imported, which to my knowledge happens very rarely (2) from my experience in selecting these samples,

we (3) would not be able to conduct a survey – this survey (4) as it is structured because the questionnaire is not (5) designed to ask only about a PBS signal carried on a (6) distant basis.

(7) ARBITRATOR WERTHEIM: You'd have a lot (8) more precise results of the systems instead of often (9) complete packages – offered a menu and individual (10) subscribers could pick individual signals or programs (11) off that menu. But they're generally not given an (12) opportunity to do that, are they?

(13) THE WITNESS: No, they're not. But it's (14) –

(15) ARBITRATOR WERTHEIM: Are they ever given (16) that opportunity?

(17) THE WITNESS: Well, the technology (18) actually has never really allowed them to be able to (19) do that. I think that – although maybe five to ten (20) years from now, you might see technology that allows (21) them to make those kinds of selections and choices. (22) But you really don't, even today, have that.

(23) ARBITRATOR WERTHEIM: Wouldn't the (24) technology now allow them to select particular – I (25) guess we'd start calling them sometimes cable

Page 986

(1) channels. Yes, I want to be able to get WTBS and I (2) want to be able to get WGN, but I don't want anything (3) else. Or yes, I want PBS and yes I want news, but I (4) don't want anything else.

(5) THE WITNESS: That certainly is a (6) possibility. There have been operators who have (7) experimented with what are known as a la carte (8) packages where subscribers can pick usually not a (9) single channel but maybe a package of only two or (10) three channels and pay a separate fee for that.

(11) And the industry has found, however, that (12) they maximize revenue by charging one fee for – if (13) you combine basic and expanded basic fee, charging one (14) fee for a broad package of services.

(15) ARBITRATOR WERTHEIM: Does that mean the (16) individual subscriber, if he wants –

(17) THE WITNESS: Well, I'm not sure I would (18) characterize it exactly that way, but there may be (19) some subscribers who view it that way.

(20) CHAIRPERSON JIGANTI: That's not someone (21) who – they can pick all sorts of –

(22) THE WITNESS: Of options? Yes.

(23) ARBITRATOR FARMAKIDES:

Same question (24) really. Because we were talking with Mr. Bortz (25) yesterday that the primary factor that the cable

Page 987

(1) operator has to look at is diversity. He needs (2) diversity. And I'm suggesting to you there is – I (3) don't know how many – one, ten, 100, 1,000 – there (4) are people who simply buy that signal for one, the (5) cable signal, for one reason only, PBS.

(6) THE WITNESS: I think that's probably (7) correct.

(8) ARBITRATOR FARMAKIDES: Because everything (9) else, they get on the local news. And they need to (10) clarify – they need a clear picture of local news (11) signals – broadcast signals, plus PBS. How would you (12) measure that?

(13) THE WITNESS: Well, again, I don't think (14) the views of an individual subscriber are reflected in (15) this survey or intended to. But I think that (16) something that Mr. Bortz may have touched on briefly (17) yesterday but I think is an important thing to (18) understand is that cable systems offer 50 to 60 (19) channels in many instances, but we know from research (20) that typically an individual subscriber watches – (21) well, I think the number has gone up.

(22) It used to be five to six of those (23) channels. I think it may be eight to nine now as (24) they've added more channels. So individuals (25) subscribers don't tend to watch all 50 or 60 of the

Page 988

(1) channels. They tend to selectively watch. But what (2) we also know from research is that that package of (3) five to eight or nine services that they watch or that (4) group is different from one subscriber to the next.

(5) And that's what makes it important for the (6) cable operator to offer this wide variety. Because I (7) may not – I may, as a business traveler, find the (8) weather channel a valuable service. Someone who (9) doesn't travel at all or who has not much interest in (10) the weather may not find any value in the weather (11) channel.

(12) So there are reasons that the operator has (13) the broad package. (14) CHAIRPERSON JIGANTI: And everybody who (15) goes into Denver International has to worry about (16) that.

(17) THE WITNESS: That's correct.

(18) (Laughter.)

(19) ARBITRATOR FARMAKIDES: I didn't mean to (20) unfairly focus on

population in (19) order to produce results that are representative of (20) that entire population?

(21) **A That is correct.**

(22) Q And the error returns that we have been (23) discussing from time to time and some of which you (24) corrected this morning, can you explain for us briefly (25) what it is that that says about your survey results?

Page 1001

(1) **A Yes. The absolute confidence interval is (2) designed to indicate the range within which you would (3) expect that there is a 95 percent chance that if you (4) surveyed every system in the universe the response (5) would fall within that range. There was a 95 percent (6) chance that the actual response of all systems would (7) on average fall within that range.**

(8) Q From a statistical perspective, if you (9) selected a sample that wasn't random, would you be (10) able to say that the results of your survey (11) necessarily were representative of the entire universe (12) of your study?

(13) **A No, you would not.**

(14) Q And it is the case that both a simple (15) random sample and a stratified random sample are (16) designed precisely to represent the entire universe (17) under observation; correct?

(18) **A Yes, they are.**

(19) Q So these studies which you have discussed (20) today represent the entire Form 3 cable operator (21) universe within the limits that you have described; (22) correct?

(23) **A Yes. It represents our effort to select (24) a sample from the entire universe, yes.**

(25) Q And that includes cable operators who may

Page 1002

(1) be operating systems in New York City and Butte, (2) Montana and West Virginia and Los Angeles and all of (3) the different variations that may exist within that (4) universe of Form 3 cable operators; correct?

(5) **A Yes, it does. And I should make a point (6) here as well that we have attempted for the purposes (7) of this proceeding to conduct statistically (8) representative or representative sampling procedures (9) and to develop statistically representative (10) projections. (11) However, there is – it is not uncommon in (12) survey research to conduct surveys which are not (13) intended to be statistically representative but still (14) can provide some useful information.**

(15) Q But you wouldn't be able to use that kind (16) of study, the latter study, to which you referred to (17) say anything with confidence about the universe as a (18) whole; correct?

(19) **A You could not – you could not project (20) dose to the universe.**

(21) Q All right. Now –

(22) ARBITRATOR WERTHEIM:

Excuse me, sir. (23) Could you explain how the term "standard deviation" (24) relates to what you've called absolute confidence (25) interval?

Page 1003

(1) THE WITNESS: Well, yes. The standard (2) deviation is a component which enters into the (3) variance calculations that are used in the statistical (4) estimation procedure.

(5) There is a standard deviation of each (6) response or each – for each category. And that would (7) not correspond directly to the – what you see in the (8) confidence interval is as – I believe there's a chart (9) under here.

(10) And the confidence interval reflects the (11) probability distribution with the estimate being the (12) mean value and the confidence interval expressing the (13) range around the declining probability of a response (14) being away from that mean.

(15) ARBITRATOR WERTHEIM: What about the (16) expression "standard error"? How does that relate to (17) your absolute confidence interval?

(18) THE WITNESS: That would be the same as (19) the confidence interval in this case.

(20) BY MR. STEWART:

(21) Q You discussed earlier today the fact that (22) a cable operator seeks to offer his subscribers (23) something unique. Is that right?

(24) **A Yes.**

(25) Q And a cable operator is motivated to

Page 1004

(1) provide a package of services that will appeal to a (2) wide variety of potential subscribers; correct?

(3) **A Yes, that's correct.**

(4) Q Now, is it also the case that a cable (5) operator is likely to select programming for resale (6) that isn't already available for free to his potential (7) subscribers?

(8) **A I'm sorry? Could you repeat that?**

(9) Q Cable operators seek out things that are (10) different and not already available in the television (11) market locally?

(12) **A Yes, they do.**

(13) Q So that something that – a kind of (14) program that could not be

obtained anywhere locally (15) off the air for free and would be appealing to (16) subscribers is something that a cable operator is (17) likely to value?

(18) **A Yes, that's correct as we had the (19) discussion with regard to the PBS signal.**

(20) Q And is it your view that a cable operator (21) is familiar with the varying tastes of individual (22) subscribers as Judge Farmakides posited about earlier (23) today?

(24) **A Well, they may not be familiar with the (25) case of individual subscribers, but they are familiar.**

Page 1005

(1) **They regularly perform customer satisfaction surveys (2) and customer interest surveys to determine throughout (3) their franchise area what their subscribers have (4) interest in.**

(5) Q And do you think that the potential (6) demands of subscribers and what a cable operator would (7) value differs from market to market and situation to (8) situation?

(9) **A Yes, it does very much so.**

(10) Q So that the distant signal programming (11) that would be valuable to a cable operator in New York (12) City might be different from that valuable to a cable (13) operator in Butte, Montana?

(14) **A Yes. I would expect that it would be (15) different in that example.**

(16) ARBITRATOR WERTHEIM: Do all cable (17) operators do such local surveys?

(18) THE WITNESS: I would say that all cable (19) operators that I have worked with in my experience, (20) but I would imagine that I wouldn't be able to say (21) that all cable operators do it. And perhaps in small (22) markets it might be less likely to be done.

(23) BY MR. STEWART:

(24) Q I'd like for illustration purposes to draw (25) three rectangles up there. I identify them as

Page 1006

(1) rectangles because my drawing skills are not always as (2) good as those of my fellow counsel.

(3) And I'm going to label these rectangles (4) "I" for an independent station, "N" for a network (5) affiliate, and "P" for a public television station.

(6) Okay? I just want these rectangles to represent, in (7) effect, the program bundles that are represented by (8) each of these stations.

(9) Now, an independent station may have any (10) of the commercial television categories included (11)

(22) We object to the admission of the exhibit (23) because we are not able to examine the column for the (24) Canadian signals to determine which were actually zero (25) awards versus which ones reflect that the system did

Page 995

(1) not carry a Canadian signal.
(2) CHAIRPERSON JIGANTI: Say that over again. (3) Say what your objection is, if you don't mind.

(4) MR. SATTERFIELD: The exhibit doesn't (5) distinguish between which zero awards in the column (6) for Canadian signals was an assignment of zero value (7) by the cable operator versus the fact that the cable (8) system did not carry a Canadian signal.

(9) CHAIRPERSON JIGANTI: Your response to (10) that?

(11) MR. HESTER: My position would be that (12) that certainly is something that counsel can explore (13) in examination of the witness, but it is not a basis (14) for refusing admission of the exhibit.

(15) It is an exhibit that reflects the data in (16) the database of the Bortz survey. And I think it's (17) directly probative of the facts I was trying to enlist (18) on examination. I think it's a point that counsel can (19) pursue with the witness.

(20) CHAIRPERSON JIGANTI: Mr. Satterfield, do (21) you have any comment on that?

(22) MR. SATTERFIELD: Subject to our stated (23) objection, I would state that we would like to have (24) the ability to examine the witness. We will withdraw (25) the objection and reserve those questions for the

Page 996

(1) witness in the PBS direct case.

(2) CHAIRPERSON JIGANTI: Since there is no (3) objection, the exhibit will be admitted.

(4) (Whereupon, the aforementioned (5) document, having previously (6) been marked for identification (7) as PBS Exhibit Number 2-X, was (8) received in evidence.)

(9) MR. NEIMAN: One more housekeeping matter, (10) Your Honor.

(11) CHAIRPERSON JIGANTI: Yes?

(12) MR. NEIMAN: We now have copies of Joint (13) Sports Claimant Exhibit 7, of the chart, in smaller (14) form. We distributed them with counsel. And it (15) should be copied to each of you.

(16) CHAIRPERSON JIGANTI: You have distributed (17) to counsel?

(18) MR. NEIMAN: Yes.

(19) ARBITRATOR FARMAKIDES: I think one point (20) I could make while

we're waiting, I think only the (21) Chairman can turn the record on or off. So while (22) someone might get up and say "We're off the record," (23) please understand that that isn't necessarily true, (24) only if the Chairman turns it off.

(25) CHAIRPERSON JIGANTI: Mr. Stewart?

Page 997

(1) MR. STEWART: Thank you. Good afternoon, (2) Mr. Trautman. I'm John Stewart on behalf of the (3) National Association of Broadcasters.

(4) CROSS-EXAMINATION

(5) BY MR. STEWART:

(6) Q First, a couple of points of (7) clarification. The studies that you have analyzed and (8) brought to us in your exhibit here analyzed cable (9) operator valuations of distant signal programming (10) during the particular year in which those signals were (11) carried. Is that correct?

(12) **A That is correct except with respect to the (13) 1978 BBDO study.**

(14) Q Yes.

(15) **A That study did not specifically instruct (16) respondents to consider the year 1978.**

(17) Q So that when you refer in this JSC Exhibit (18) 7, for example, and in your own exhibit to the 1983 (19) BBC study, that was a study about the valuations of (20) the signals carried in 1983; correct?

(21) **A That is correct.**

(22) Q Now, you're also familiar, I take it, with (23) the fact that the distribution proceedings, such as (24) this distribution proceeding, occur sometime after the (25) year in which the distant signals are carried;

Page 998

(1) correct?

(2) **A Actually, I'm not –**

(3) Q Well, you describe as one of the (4) criticisms of the 1983 and 1986 studies that they were (5) performed a year or more after the time during which (6) the signals were carried.

(7) **A Yes. That was a criticism of those (8) surveys.**

(9) Q And do you know whether those surveys were (10) prepared as of the time the distribution litigation (11) was going forward?

(12) **A Yes. I believe they were prepared in (13) preparation.**

(14) Q And so beginning with 1989, is it the case (15) that the Sports Claimants commissioned studies that (16) actually began in each year in which the cable (17) carriage happened?

(18) **A Yes except for 1991. The survey began (19) shortly after the**

first of the year in '92. But in (20) general they began in December.

(21) Q So in 1991, just to use that example, that (22) was the latest of these –

(23) **A Yes.**

(24) Q – vis-a-vis the year which – that study (25) was performed prior to the time that this litigation

Page 999

(1) happened. Is that right?

(2) **A That is correct.**

(3) Q So the fact that there is a 1993 study (4) that was performed in or around 1993 does not indicate (5) that there is or is not going to be a 1993 (6) distribution proceeding; correct?

(7) **A No.**

(8) Q So the timing of those studies was (9) designed in order to meet the criticism that a study (10) performed well after the time in which the carriage (11) happened was less reliable; correct?

(12) **A That's correct.**

(13) Q I wanted also to call your attention to (14) one other observation that was made by the panel about (15) Exhibit 7 here. Are you familiar with the syndicated (16) exclusivity rules?

(17) **A Yes, I am.**

(18) Q And do you know that the syndicated (19) exclusivity rules were re-instituted in 1990, –

(20) **A Yes.**

(21) Q – the beginning of 1990?

(22) **A Yes, I do.**

(23) Q And that they were not in effect in 1986 (24) or 1989?

(25) **A Yes, I do know that.**

Page 1000

(1) Q And that the effect of the syndicated (2) exclusivity rules is to delete from distant signals (3) certain syndicated programs; correct?

(4) **A Yes, that's correct.**

(5) Q Now, would that be consistent with a (6) pattern of valuation of syndicated series that had a (7) decline beginning in 1990?

(8) **A Yes, it would be consistent with that.**

(9) Q Can you tell us in survey research what is (10) the purpose of selecting a random sample?

(11) **A Well, the purpose of selecting a random (12) sample is to be able to have a statistically valid set (13) of responses; in other words, to select a sample that (14) is representative of whatever population that you're (15) picking the sample from.**

(16) Q So if we're looking at Form 3, cable (17) operators who carry distant signals in a particular (18) year, you take a random sample of that

(1) Q Now, that was the first year the (2) devotionals were included, but that year the BBC (3) survey did not include us; right?

(4) **A That is correct.**

(5) Q And you mentioned that there was some (6) criticism leveled at that survey. And it was only (7) after that that we were included in the survey in the (8) subsequent years; right?

(9) **A That's correct.**

(10) Q Okay. I believe you mentioned before – (11) correct me if I'm wrong about this – that because of (12) improvements in the BBC survey in 1983 that you felt (13) like that was a reason why the tribunal at the time (14) recognized the improvements and increased the sports (15) award in that distribution proceeding to 36 percent. (16) Is that?

(17) **A Well, I believe my reference in my earlier (18) testimony was to the tribunal discussing changed (19) circumstances and not specifically discussing the BBC (20) survey.**

(21) Q Oh, okay. Do you know what the change in (22) the devotional award was in 1983 relative to 1980 –

(23) **A No, I do not.**

(24) Q – or 1986, the next survey, relative to (25) 1983?

Page 1013

(1) **A I'm not familiar with that, no.**

(2) Q Okay. Let's look at your Exhibit A, Page (3) 31. And if you could keep your finger in there, also (4) Exhibit G, Page 36.

(5) Q Now, just as Mr. Stewart – this is in (6) your appendix?

(7) **A Yes.**

(8) Q Question 4. On each of these pages, I'm (9) asking that you direct your attention to Question 4.

(10) **A All right.**

(11) Q Now, by the way, isn't this the result (12) reflected on the chart here?

(13) **A Yes.**

(14) Q This is for all the years reflected on (15) your table?

(16) **A Right.**

(17) Q So on Page 31 that reflects the survey (18) results for the 1990 year?

(19) **A Yes.**

(20) Q And Pages 36 is the 1991 year. Before we (21) get to that, I just want to emphasize one thing and (22) make sure this is clear. I think Mr. Neiman mentioned (23) this. On the chart that you received – he mentioned (24) this this morning as well. Please confirm or correct (25) me if I'm wrong about this. This devotional point

Page 1014

(1) right here for the 1983 BBC appears to show that there (2) was a result in the

1983 BBC survey. Is that correct?

(3) **A No, it is not.**

(4) Q Where should it be?

(5) **A The devotional category was included in (6) the ELRA survey.**

(7) Q So is this the right place where that (8) point would be?

(9) **A Yes.**

(10) Q And the slope of that line would be just (11) somewhat less severe? It would come from this point (12) to here. Is that right?

(13) **A Yes.**

(14) Q I'm just saying that merely as a (15) clarification to make sure of that.

(16) CHAIRPERSON JIGANTI: It's reflected on (17) what was presented.

(18) MR. CAMPANELLI: Oh, okay.

Thank you, (19) Your Honor.

(20) BY MR. CAMPANELLI:

(21) Q Sorry. Now I know you've taken your (22) fingers out of there, but let's just go back a little.

(23) **A I have it.**

(24) Q Looking at the devotional and religious (25) category for 1990, the result there was 3.8 and .6.

Page 1015

(1) Is that right? 3.8 is the percent allocation?

(2) **A Yes.**

(3) Q And .6 is the absolute confidence (4) interval?

(5) **A That's correct.**

(6) Q And then on Page 36 for 1991, similarly, (7) the percent allocation there is 4.3 for devotional and (8) religious and a 0.7 allocation confidence interval; (9) correct?

(10) **A That's correct.**

(11) Q And then I'd like to just ask you. You (12) have in here in your Table 1 the results for 1992. (13) But the confidence intervals are shown in Mr. Bortz's (14) testimony. Isn't that correct?

(15) **A That's correct.**

(16) Q That have been admitted here? Let me just (17) bring this to you and ask you to –

(18) MR. CAMPANELLI: This is Table 11 on Page (19) 31 of the Bortz testimony. I'm just going to have him (20) remind us about the devotional result there.

(21) BY MR. CAMPANELLI:

(22) Q What is the percent allocation for 1992?

(23) **A 3.9 percent.**

(24) Q And the confidence interval?

(25) **A 0.6 percent.**

Page 1016

(1) Q Okay. Now –

(2) ARBITRATOR WERTHEIM: It's the same as it (3) was in '91 in both respects?

(4) THE WITNESS: No. I believe it

was 4.3 (5) and 0.7 in 1991, Page 36.

(6) MR. CAMPANELLI: I'm now going to give the (7) witness, the panel, and my co-counsel a formerly (8) pretty document that was changed because of the change (9) in the numbers today which is marked Devotional (10) Claimants Exhibit 1-X.

(11) BY MR. CAMPANELLI:

(12) Q Now, this is just a summary.

And I'd like (13) for you to confirm for me, if you will – I'll tell (14) you what this is. This is just a table summarizing (15) the results in the percent allocation and the absolute (16) confidence interval for those, for the years 1990 to (17) '92?

(18) **A Yes.**

(19) Q Now, does this look like an accurate (20) representation to you?

(21) **A Well, yes, it does. The percent**

(22) allocation is our best estimate of what the value for (23) devotional programming is. And I believe your low and (24) high range would represent the range within we would (25) have – within which we would have a 95 percent

Page 1017

(1) **confidence that the actual value if we surveyed the (2) entire universe would fall. But, again, I emphasize (3) that the percent allocation represents the highest (4) probability and best estimate.**

(5) Q So what you're saying represents the (6) highest probability and the best estimate is in the (7) second column there, the percent allocation?

(8) **A That's correct.**

(9) Q So that would be 3.8 for 1990, 4.3 for (10) 1991, and 3.9 for 1992; correct?

(11) **A Yes.**

(12) Q Now, the correction that's noted on here (13) is the correction that you gave this morning. Isn't (14) that correct?

(15) **A That is correct.**

(16) Q And applying these confidence intervals to (17) the percent allocation just to give us the range, what (18) would that give us if we applied the confidence (19) interval to the percent allocation?

(20) **A Well, as I said, that would yield the (21) range within which we would have a 95 percent (22) confidence that if we were to survey, take a census of (23) the entire universe, the actual answer would fall.**

(24) Q Okay. And so for the three years, is it (25) a correct characterization, then, to say that you have

Page 1018

(1) a 95 percent confidence level that the range would be (2) no lower than 3.2 percent for 1990, 3.6 percent for (3) 1991, and 3.3 percent for 1992? Is that correct?

(4) **A That is correct.**

(5) Q And, similarly, the high end of that range (6) would be 4.4 percent for 1990, 5 percent for '91, and (7) 4 and a half percent for 1992?

(8) **A That is correct.**

(9) Q Okay.

(10) ARBITRATOR WERTHEIM: Now, are you telling (11) us that anywhere within that range, you're 95 percent (12) confident or certain that a 100 percent census would (13) fall within that range?

(14) THE WITNESS: Well, I'd phrase it a little (15) bit differently. We are confident that a 100 percent (16) census, the average result – the average resulting (17) from a 100 percent – the average response from a 100 (18) percent census would fall within that range. We are (19) 95 percent certain, just as this percent allocation (20) here is the average response.

(21) ARBITRATOR WERTHEIM: Now, you've also (22) expressed some greater probability that the median (23) number would be the yield of a 100 percent survey. Is (24) that right?

(25) THE WITNESS: That is correct.

Page 1019

(1) ARBITRATOR WERTHEIM: How much greater (2) confidence do you have that the median figure – is it (3) something more than 95 percent?

(4) THE WITNESS: No, no, no. That's not the (5) way to look at it. The probability distribution – if (6) you sum – and I am not a statistician. The area (7) underneath this curve would include – with a bound (8) set to represent 95 percent confidence, the area (9) between, if this were the 2 boundaries of 95 percent (10) confidence, the area underneath this curve, 95 percent (11) of the responses would fall in the area under that (12) curve.

(13) I can't say specifically what the (14) probability of this point is, but, as you can see, the (15) probability of any response away from the mean falls (16) rapidly so that by the time you get out near here, (17) say, in our case since we had about a plus or minus 2, (18) by the time you get out to 40.8, instead of 38.8, (19) there's a very low individual probability that the (20) result from the entire universe would be 40.8. The (21) greatest probability is in here.

(22) ARBITRATOR WERTHEIM: And when you say you (23) have 95 confidence in that result, how would

you (24) describe the other 5 percent?

(25) THE WITNESS: Well, there is a five

Page 1020

(1) percent chance that if you surveyed the entire (2) universe, the response would fall outside that range. (3) And as you get farther away from that plus or minus (4) two, that five percent shrinks and shrinks and (5) shrinks. So that's less likely at each point away (6) from that that you would get that response.

(7) ARBITRATOR WERTHEIM: What do you mean, (8) with a lower confidence interval?

(9) THE WITNESS: I may not be making myself (10) clear. Outside of the 95 percent confidence interval, (11) you would expect there is a 5 percent chance that the (12) population characteristic is outside of the – is more (13) than 2 points away, plus or minus, from the best (14) estimate.

(15) ARBITRATOR WERTHEIM: That's assuming a (16) confidence interval of 2.0? Is that what you're (17) saying?

(18) THE WITNESS: Yes, making that assumption. (19) As you move away from – as you go more than 2.0 away (20) from 38.8, at each point further away from 38.8, (21) there's a less and less likelihood. And it's much (22) less than 5 percent for any individual point that you (23) would have – you would end up with that result.

(24) ARBITRATOR WERTHEIM: Well, some of these (25) earlier surveys had confidence intervals substantially

Page 1021

(1) higher than 2.0, didn't they, or even this one for (2) questions other than Question Number 4?

(3) THE WITNESS: That's correct. The goal of (4) the surveys was to predict with a high degree of (5) confidence for the allocation question.

(6) ARBITRATOR WERTHEIM: Sorry to interrupt.

(7) MR. CAMPANELLI: Oh, certainly.

(8) BY MR. CAMPANELLI:

(9) Q Let me just make sure I get one thing (10) straight. Following up on Judge Wertheim's question, (11) you've done a survey, survey as a sample of the entire (12) universe of cable systems, operators of cable systems; (13) correct?

(14) **A Yes.**

(15) Q It's a sample of that?

(16) **A That's correct.**

(17) Q It's not the entire universe? And so for (18) devotionals, for instance, let's take this 1992 (19) figure. You said the percent allocation was 3.9 (20) percent. So the percent allocation on this chart here (21) – you know, maybe it's not shaped like this, but it (22) would

– the central point, the highest point, would (23) be at 3.9 percent; correct?

(24) **A That's correct.**

(25) Q And then you show for 1992 a confidence

Page 1022

(1) interval of 0.6?

(2) **A Uh-huh.**

(3) Q Now, my understanding is that if this is (4) 3.9 right at the center of that thing and if you went (5) 0.6 this way or 0.6 this way, –

(6) **A That's correct.**

(7) Q – which would get us to either 3.3 on the (8) low side or 4.5 on the high side, –

(9) **A Right.**

(10) Q – you would have 95 percent confidence (11) that if you actually went to every cable operator in (12) the universe, that their answers would fall within (13) that range somewhere.

(14) **A That is correct.**

(15) Q Is that correct?

(16) **A That's correct.**

(17) Q And so for each one of these figures where (18) for us it was 0.6 in this Table 11, for sports it was (19) only 2.2 percent confidence interval compared to 38 (20) percent. Your understanding is that this survey means (21) you have 95 percent confidence that it will be at this (22) point with the greatest degree of certainty or off in (23) sports' case by 2.2 percent one way or another, that (24) the entire universe of answers would fall. You have (25) 95 percent confidence that they fall in there, which

Page 1023

(1) means you only have a 5 percent confidence that they (2) wouldn't fall in?

(3) **A Five percent probability.**

(4) Q Probability.

(5) **A Yes.**

(6) ARBITRATOR WERTHEIM: You're using the (7) words "confidence" and "probability" interchangeably?

(8) THE WITNESS: Yes. The confidence (9) interval reflects the 95 percent probability that the (10) answer will fall within that range.

(11) BY MR. CAMPANELLI:

(12) Q Just one last question or set of questions (13) on this, again under devotional data that's reflected (14) on your Table 1 and also on your chart here. You (15) mentioned before, I think, that when you were (16) evaluating this table and the chart that it was your (17) opinion that the consistency shown on here is evidence (18) of the reliability of these data over time, that as (19) it's been consistent over time, that's evidence of the (20) reliability.

within it; correct? Because it could have movies and (12) sports and syndicated shows and news and religious or (13) devotional programs all combined in the same signal; (14) correct?

(15) **A It may, yes.**

(16) Q And for a network affiliate, that kind of (17) station would have programming – let's call it an ABC (18) affiliate – that comes from ABC and is not at issue (19) in this proceeding; correct?

(20) **A Correct.**

(21) Q Now, in addition to that network (22) programming, it may also have each of the other kind (23) of categories of programs on it in the non-network (24) portion of its schedule; correct?

(25) **A Correct.**

Page 1007

(1) Q So it could have movies and sports and (2) syndicated series and news and religious programming; (3) correct?

(4) **A Yes.**

(5) Q Now, an educational signal would have PBS (6) programming, what's been referred to in this (7) proceeding as PBS programming; correct?

(8) **A Yes.**

(9) Q Now, in these cable operator valuation (10) surveys, a cable operator who carried one independent (11) distant signal, one network-affiliated distant signal, (12) and one educational distant signal, when he's asked to (13) allocate value among the commercial television program (14) categories would be thinking about the programs, these (15) commercial program categories, on the independent (16) station and the network affiliate; correct?

(17) **A That is correct to the extent all those (18) categories are represented, yes.**

(19) Q And then what the cable operator was asked (20) to do was to allocate the fixed values among the (21) different program categories that appeared on those (22) two stations; right?

(23) **A That's correct.**

(24) Q Now, back to our discussion of New York (25) and Butte, a cable operator in New York might assign

Page 1008

(1) different values to the different categories here than (2) the cable operator in Butte; correct?

(3) **A Yes.**

(4) Q And let's look at Mr. Hester's Exhibit (5) 2-X. Do you still have a copy of that?

(6) **A Yes, I do.**

(7) Q And turn to the same page he was looking (8) at with you before?

(9) **A The 1992 data or –**

(10) Q Correct, the third page of that exhibit. (11) Let's just look at Line Number 1. And that respondent (12) allocated a value of 50 percent to movies and 30 (13) percent to sports, 10 percent to syndicated, 5 percent (14) to news, and 5 percent to PBS; correct?

(15) **A Yes.**

(16) Q Now, that might be a cable operator – you (17) don't know this for certain, but that might be a cable (18) operator, let's say, in New York City, someone who had (19) lots of local news and for whom local news or (20) station-produced news on distant signals was not as (21) valuable as movies were; correct?

(22) **A Yes, that could be the case.**

(23) Q Let's look at Line Number 2.

This one (24) gives movies 20 percent, sports 40 percent, syndicated (25) series 5 percent, news 20 percent, PBS 5 percent, and

Page 1009

(1) religious 10 percent. Do you see that?

(2) **A Yes.**

(3) Q Now, this might be a kind of a cable (4) operator for whom devotional programming is (5) particularly attractive to a group of potential (6) subscribers and for whom the news on distant signals (7) might be important; correct?

(8) **A That could be true, yes.**

(9) Q And if you look at the range in the news (10) category, it goes in this page from zero to 30 percent (11) in various situations. I wish Mr. Hester had picked (12) a page that had a 50 percent number for news. But it (13) is that variety which may reflect these cable (14) operator, differences in cable operator, marketplace (15) circumstances that your study captures; correct?

(16) **A Yes. You would expect these kinds of (17) variations because of the differences from market to (18) market and the different signal carriage that (19) different systems have.**

(20) Q And if your ultimate objective is to (21) measure the relative values of these program types for (22) all of the Form 3 cable universe doing so by taking a (23) random sample and combining all of the results, (24) whether they're zeros or 50s or 30s, combining them (25) all together in a systematic way is the way to produce

Page 1010

(1) a result that predicts the universe; correct, –

(2) **A Yes.**

(3) Q – that represents the universe?

(4) **A Yes.**

(5) MR. STEWART: I have no further questions. (6) Thank you.

(7) CHAIRPERSON JIGANTI: Thank you, Mr. (8) Stewart.

(9) Mr. Campanelli?

(10) MR. CAMPANELLI: Hi, Mr.

Trautman. I'm (11) Rick Campanelli, counsel for the Devotional Claimants.

(12) I've just got a few questions for you.

(13) CROSS-EXAMINATION

(14) BY MR. CAMPANELLI:

(15) Q Let's look at your Table 1 on Page VI of (16) your exhibit. Now, looking at your Table 1, first I (17) just want to make it clear the Devotional Claimants (18) had not retained you or Bortz and Company or these (19) prior companies that you had worked with to prepare (20) any of these surveys. Is that correct?

(21) **A No.**

(22) Q And we didn't produce –

(23) **A That is correct.**

(24) Q Thank you. And did we participate in the (25) preparation or gathering of any information –

Page 1011

(1) **A No.**

(2) Q – for any of these surveys?

(3) **A No.**

(4) Q What about with regard to the ELRA? I (5) think you mentioned before the 1983 survey. Did we (6) have anything to do with sponsoring that exhibit?

(7) **A My understanding is it was sponsored by (8) the NAB.**

(9) Q Okay. Well, now let's look at your table (10) and take a look here at these first few years, up to (11) 1983. For devotional it says "N/A." Now, does that (12) stand for nah, that they weren't included in there?

(13) **A That does stand for the fact that they – (14) respondents were not questioned about devotional (15) programming.**

(16) Q Thank you. That's a much more precise way (17) of saying that.

(18) Now the first time. So the first time any (19) survey of this sort included devotional programming (20) was the 1983 ELRA survey. Is that right?

(21) **A That's correct.**

(22) Q And the result there shown is what?

(23) **A 7.24.**

(24) Q Right. Twenty-four.

(25) **A Yes.**

Page 1012

(21) **A Yes.**

(22) Q Is that? I'm sorry. That's correct?

(23) **A I believe so, yes.**

(24) Q And then looking at the devotional (25) numbers, let me just read them to you from the chart.

Page 1024

(1) I'll just read. The ELRA study was 7.24 percent, but (2) your organization or its predecessors in these surveys (3) did not produce the ELRA study. But in the others the (4) results were the percent allocations were in 1996 3.5, (5) 1989 4.3, 1990 3.8, and then for the next 3 years: (6) 4.3, 3.9, and 4.0.

(7) Is that the sort of consistency that's (8) consistent with your notion that consistency over time (9) suggests for reliability of the survey data?

(10) **A Yes, it is.**

(11) MR. CAMPANELLI: Okay. Thank you very (12) much.

(13) Oh, I need to - excuse me - move the (14) introduction of Devotional Claimants Exhibit 1-X. And (15) I would also offer to make it prettier by substituting (16) a document on Monday.

(17) CHAIRPERSON JIGANTI: Any objection to the (18) admission of Devotional Claimants?

(19) (No response.)

(20) CHAIRPERSON JIGANTI: No objection. It (21) will be admitted. You can make your motion Monday to (22) substitute.

(23) (Whereupon, the aforementioned (24) document was marked for (25) identification as Devotional

Page 1025

(1) Claimants Exhibit Number 1-X.)

(2) MR. NEIMAN: Just one more housekeeping (3) matter. I just want to apologize again. I'm actually (4) the person who prepared the JSC Exhibit 7 chart, not (5) Mr. Trautman. I've just noticed one more, one other (6) error on it. I want to apologize for that.

(7) It's the 1990 study. The Canadian result (8) there with the triangle in 1990 should be down at the (9) bottom line, not up where it is.

(10) MR. HESTER: I'm sorry. I don't (11) understand.

(12) MR. NEIMAN: If you look at Table 1 on Mr. (13) Trautman's testimony, you'll notice that there is no (14) number for the Canadian programming in the 1990 (15) result. So there should not be an indication of the (16) Canadian result on Exhibit 7 for 1990.

(17) CHAIRPERSON JIGANTI: It conforms with (18) Table 1 there?

(19) MR. NEIMAN: Yes. And I just want to (20) apologize to the panel for that. I

just think it was (21) mine, not Mr.

Trautman's.

(22) CHAIRPERSON JIGANTI: Mr. Lane?

(23) MR. LANE: Thank you.

(24) CROSS-EXAMINATION

(25) BY MR. LANE:

Page 1026

(1) Q Mr. Trautman, I want to just go back to (2) this chart. Are you saying that all of the responses, (3) 95 percent of the responses, to the survey - I don't (4) know which one. Which one were you using in that (5) case? Do you recall?

(6) **A Well, the 38.8 I believe reflected the (7) 1992 results.**

(8) Q Are you saying that all of the sports (9) answers in the 1992 survey, 95 percent of them fell (10) within 2 points on either side of 38.8?

(11) **A No, I'm not saying that.**

(12) Q That isn't what a confidence interval (13) does, does it?

(14) **A No.**

(15) Q And, in fact, isn't it true that the (16) sports answers not only in 1992, but in all of the (17) years, fell from zero to 100? If we looked, we could (18) probably find one at every 10 percent or perhaps even (19) every 5 percent; right?

(20) **A I haven't looked at the data in that way. (21) I know that you identified a 100 percent response (22) yesterday.**

(23) Q Do you want to take the time or would you (24) like to - have you ever looked at it that way?

(25) **A I haven't specifically looked to see if**

Page 1027

(1) **there's a response at every five percent.**

(2) Q Would it surprise you if there were?

(3) **A No, it would not surprise me.**

(4) Q So that the responses to the sports (5) questions fall across the whole range from zero to 100 (6) percent?

(7) **A Yes, they do, although I know that, for (8) example, in 1992 one calculation that I have done is (9) that more than three-fourths of the respondents (10) allocated their highest value or a value equal to but (11) unsurpassed by any other category to sports. So that (12) would suggest that, again, more than three-fourths of (13) respondents gave a rather high value to sports.**

(14) Q But it doesn't suggest what the absolute (15) number of that response is, does it?

(16) **A I don't understand your**

question.

(17) Q All you're telling me is that that's (18) higher than some other number. You're not telling me (19) what the number is; right, with that?

(20) **A I'm telling you that that's higher than (21) the response to any other category.**

(22) Q Now, correct me if I'm wrong. I always (23) thought that the 95 percent confidence interval meant (24) that if you asked another sample of exactly the same (25) size and composition, in 19 out of 20 times you would

Page 1028

(1) expect an answer within that range. Am I wrong in (2) that thinking?

(3) **A What you can state is that - that is (4) correct. And I believe you can state in this instance (5) that if you had 95 percent confidence, that if you (6) were to take a survey of the entire population, that (7) the response would fall within that range.**

(8) Q But technically that's not the definition (9) of what a confidence interval is. Isn't that correct?

(10) **A I would have to defer to Dr. Bardwell on (11) that.**

(12) Q Okay. Now, just so that it's clear, if we (13) drew a 99 percent confidence interval on this, it (14) would be out, further out, wouldn't it, than what's (15) drawn here for the 95 percent confidence interval? It (16) would be somewhere out here. It wouldn't be closer, (17) would it?

(18) **A Well, the shape of the curve wouldn't (19) change, but -**

(20) Q But the points would be out farther on the (21) line; right?

(22) **A The points would be out farther, yes.**

(23) Q So, instead of 2.2, we might get something (24) like 3.1 or 3.2 for the -

(25) **A I haven't done the calculations. So I**

Page 1029

(1) **don't know what we would get.**

(2) Q But, I mean, it would be higher than 2.2, (3) wouldn't it?

(4) **A That is correct.**

(5) Q So that what that means is that you have (6) to have a broader range of answers to increase the (7) probability that you're getting the correct answer; (8) right?

(9) **A I'm not sure I understand what you're (10) saying "a broader range of answers."**

(11) Q Well, doesn't the 99 percent confidence (12) interval give you a broader range?

(13) **A You seem to have phrased it in terms of a (14) broader range of**

answers. It wouldn't –

(15) Q Right, the broader range between –

(16) A – change the response to the survey at (17) all.

(18) Q Wouldn't change the responses. It would (19) change the confidence interval, wouldn't it?

(20) A If you – well, by definition if you're (21) using a 99 percent confidence interval, it's different (22) from a 95 percent confidence.

(23) Q And it's broader, isn't it, or wider or (24) greater, however you want to term it?

(25) A Yes. The plus or minus range would be

Page 1030

(1) larger.

(2) Q Now, what determines the size of the (3) confidence interval?

(4) A I am not expert in that area.

(5) Q Well, you've testified about that, haven't (6) you, in your description of the methodology for the (7) 1990 and '91 setting?

(8) A Will you refer me to the page?

(9) Q Page 33-34, for example, for 1991.

(10) A Yes.

(11) Q And you don't know what determines the (12) confidence intervals?

(13) A Well, I'm not sure that – what you are (14) referring to on these pages I'm not sure does (15) determine the confidence intervals. What are you (16) referring to on these pages?

(17) Q I'm not saying. I'm asking you what does (18) determine the confidence intervals.

(19) A What does determine the confidence (20) intervals?

(21) Q Yes.

(22) A I could not specifically answer that (23) question.

(24) Q Now, just for example, today on Pages 31 (25) and 32 you changed all of the confidence intervals for

Page 1031

(1) all of those tables, did you not?

(2) A Yes, I did.

(3) Q And what caused that change?

(4) A A change in the data that was used in the (5) calculation, not the underlying data, but the universe (6) data that were applied in the 1990 tabulation.

(7) Q What data changed?

(8) A The figure for the universe representation (9) by –

(10) Q Could you tell me in terms other than what (11) you've just said what you mean?

(12) A Yes. In 1990 we originally –

the same (13) sample is drawn, was used in 1990. First of all, the (14) 1990 survey was a survey for which we tabulated (15) results only. That survey –

(16) Q Excuse me. Did you tabulate the (17) confidence intervals for it?

(18) A I did not personally.

(19) Q I mean, when I say "you," I mean Bortz and (20) Company.

(21) A Yes, that is correct.

(22) Q I'm sorry. What changed? And you were (23) going to tell me in different terms what changed to (24) cause the confidence intervals to be revised?

(25) A The results in the 1989 or in the 1990

Page 1032

(1) survey had been tabulated based on total royalties for (2) the entire universe and number of systems in the (3) entire universe that had originally reflected the 1989 (4) universe. In other words, the universe which the (5) sample was originally drawn for, the correction (6) reflected an adjustment to tabulate the results based (7) on applying the 1990 systems and royalties by strata.

(8) Q Okay. So you're aware that the 1989 (9) sample was actually drawn from 1988-2 royalty (10) information, are you not?

(11) A Yes, I am aware of that.

(12) Q So what you're saying, as I understand it, (13) somehow you changed that from 1988 information to 1990 (14) information?

(15) A That is correct.

(16) Q And what did you change exactly?

(17) A We applied in the universe data for the (18) 1990-1 royalty payments by strata, which was (19) comparable to the data that was used for the (20) individual royalties of the systems that were included (21) in the tabulation.

(22) Q So for each respondent, did you change the (23) royalty figure from a 1988-2 to a 1990-1 figure?

(24) A No. The respondents already were based on (25) a 1990-1 royalty figure. I changed the totals for the

Page 1033

(1) entire universe or Bortz and Company changed them.

(2) Q Did people move in and out of the strata (3) as a result of from, say, Stratum 1, Stratum 1 to (4) Stratum 2 or vice versa or 2 to 3 or 3 to 4, something (5) like that?

(6) A What I said is that we changed the (7) universe, not the responses of

the individual – or (8) not the royalties for the individual systems.

(9) ARBITRATOR WERTHEIM: When you say (10) "sample," you mean the same systems were surveyed?

(11) THE WITNESS: That's correct. Let me (12) correct the record. We did not conduct the 1990 (13) survey. We merely tabulated the results of that (14) survey. The survey was conducted by Burke Marketing (15) Research.

(16) ARBITRATOR WERTHEIM: But you told Burke (17) to –

(18) THE WITNESS: No. We didn't –

(19) ARBITRATOR WERTHEIM: –

"Conduct your (20) survey" –

(21) THE WITNESS: We did not –

(22) ARBITRATOR WERTHEIM: – "among the same (23) companies for 1989"?

(24) THE WITNESS: No. In 1990 Bortz and (25) Company was not retained by the Joint Sports Claimants

Page 1034

(1) to conduct a survey. We later agreed to tabulate the (2) results of the survey that had been designed and (3) executed by Burke Marketing Research.

(4) ARBITRATOR WERTHEIM: But, in fact, in (5) doing the survey, Bortz and Company used the same (6) cable systems that had been identified as the samples (7) in the '89 survey?

(8) THE WITNESS: That is correct.

(9) BY MR. LANE:

(10) Q And just so I'm clear on that, but you, (11) Bortz, somebody at Bortz, changed – if somebody had (12) moved from '88 to '89 – let's say it was a growing (13) system and they moved from a Stratum 3 to a Stratum 4. (14) Did you move them into Stratum 4 for purposes of 1990?

(15) A In the tabulation?

(16) Q Yes.

(17) A We did move them into Stratum 4 for (18) purposes of the tabulation is my understanding of (19) that.

(20) Q Now, was that the change you made today or (21) was that done previously and the change you made today (22) was just this universe change?

(23) A That was done previously.

(24) Q Just sticking to the 1990 study for a (25) minute, referring to Page – you talk about this on

Page 1035

(1) Pages 17 and 18; correct, in addition to the (2) methodologies?

(3) A That is correct.

(4) Q And looking at Page 18 in the "Criticisms" (5) section, the second paragraph, –

(6) **A Yes.**

(7) Q – you say that "approximately one-fifth (8) of the respondents mistakenly omitted certain most (9) often network signals carried on a distant basis." (10) Were the respondents requested in the 1990 survey to (11) tell you what distant signals they carried?

(12) **A Were the respondents requested?**

(13) Q Yes.

(14) **A The survey – the questionnaire was not (15) designed to request of respondents what signals they (16) carried – requested of the respondents what signals (17) they carried.**

(18) Q So you don't mean that the respondents (19) mistakenly omitted –

(20) MR. NEIMAN: Read the whole sentence for (21) the record.

(22) THE WITNESS: No. You're not reading the (23) sentence correctly. It says, as I already cited in my (24) direct testimony, that "The signal carriage (25) information provided by Burke to approximately

Page 1036

(1) one-fifth of the respondents mistakenly omitted (2) certain most often network signals carried on a (3) distant basis."

(4) BY MR. LANE:

(5) Q And how did you discover that?

(6) **A In review of the questionnaires in the (7) process of entering the data.**

(8) Q Did any of the respondents mention this in (9) the interviews?

(10) **A I don't specifically recall whether they (11) did or didn't.**

(12) Q Did any of them express confusion about (13) what distant signals they carried?

(14) **A I don't specifically recall whether they (15) did or didn't. The surveys that I reviewed for the (16) 1990 survey did not have comments from respondents of (17) – or reflect comments of respondents of any type on (18) them.**

(19) Q Do you know, were there different (20) instructions given in 1990 from the other years?

(21) **A I don't know because I didn't – I wasn't (22) involved in the execution of the survey.**

(23) Q But there's no indication that any of the (24) – this would be about 43 respondents received (25) mistaken information about their distant signal

Page 1037

(1) carriage when they were told?

(2) Just to be clear, this was – if you turn (3) to Page 48, which is the 1990

questionnaire, –

(4) **A Yes.**

(5) Q – you're talking about on the second (6) question the call letters were incorrectly listed or (7) not the call letters were listed. There were some (8) stations just simply omitted from this list; correct?

(9) **A Yes. And, as I said, in approximately (10) one-fifth of the instances, we discovered in reviewing (11) the questionnaires which Burke had prepared that (12) signals had been omitted.**

(13) Q And this was about one-fifth of 216 (14) respondents that you identified on Page 17?

(15) **A There were 173 respondents.**

(16) Q Well, there were 216 included in the (17) sample.

(18) **A You said "respondents." There were 173 (19) respondents.**

(20) Q So that's a question I'd like to get into. (21) So in – I'm sorry?

(22) CHAIRPERSON JIGANTI: Mr. Lane, would this (23) be in your examination a good time?

(24) MR. LANE: Sure.

(25) CHAIRPERSON JIGANTI: All right. Before

Page 1038

(1) we do break, Mr. Trautman, you're free. This is sort (2) of a housekeeping matter.

(3) We talked at the beginning here about a (4) clerk. And I'd just as soon this be on the record. (5) We had talked about a clerk. And I had suggested that (6) there was somebody in Chicago, one of my former (7) clerks, who was available when we were considering it.

(8) Perhaps I should give you further background so that (9) you can check.

(10) Her name is Katrina, K-A-T-R-I-N-A, (11) Veerhusen, V, double E, R-H-U-S-E-N. She is married. (12) She was my clerk for about 15 years ago or a dozen (13) years ago at least. And she worked with a lawyer in (14) Chicago by the name of Kevin Forde, very successful (15) law, individual practice.

(16) MR. GARRETT: I'm sorry. I missed the (17) name.

(18) CHAIRPERSON JIGANTI: Kevin Forde, (19) F-O-R-D-E, former President of the Chicago Bar (20) Association in Chicago, pretty prominent lawyer, used (21) to be a clerk for one of the federal judges there, (22) Judge Campbell.

(23) At any rate, her husband is with – and I (24) think he's the one chiefly at issue here – the law (25) firm of Mayer, Brown and Platt. Of course, you're

Page 1039

(1) familiar with that. And I saw him last

Saturday night (2) at my house because we had all my ex-clerks over there (3) and I talked to him.

(4) I really didn't understand what his (5) position was over there. I knew he was a partner. (6) And I knew he had been a partner and he was a (7) litigator. (8) And I know he does not represent the NBA. (9) At least I know inferentially because we were talking (10) about basketball. He didn't mention anything about (11) that. I could find out more specifically, but I'm (12) relatively certain.

(13) Whether he has any administrative (14) responsibilities concerning litigation in the NBA I (15) don't know. I know he does have administrative (16) litigation responsibilities.

(17) It's a very, very large firm. And I know (18) specifically he told me the other day just in talking (19) generally about his position he didn't know a great (20) deal about particular cases. He knew about cases in (21) the former group that he headed, but generally now.

(22) What he knows about the NBA I could find (23) out. Anything more that you want me to find out about (24) it or about him?

(25) We'll take a 10-minute recess.

Page 1040

(1) MR. GOTTFRIED: What is his name?

(2) CHAIRPERSON JIGANTI: His name is Richard (3) McCombs, M-C, capital C-O-M-B. You know, I'm not (4) positive whether there's an S on there or not. I (5) should know, but I don't for sure.

(6) Well, Judge Farmakides wanted me to remind (7) you what we're looking for is somebody not in this (8) industry because we gather that's the sensibility. We (9) want somebody who is not going to taint us in any way. (10) And I can assure you I know Katrina well. And I think (11) she's very intelligent, but she's not in this (12) industry.

(13) Yes?

(14) MR. HESTER: What was the nature of her (15) practice, Your Honor, while she – I take it she (16) worked for a number of years with this fellow, Kevin (17) Forde?

(18) CHAIRPERSON JIGANTI: Yes. Kevin is a (19) very successful general practitioner, mainly in (20) litigation, did a lot of work representing the power (21) company there, I think Commonwealth Edison, and quite (22) a bit of – I know she represented some pension funds. (23) And I know she did a lot of appeal work for Kevin. I (24)

don't know what else.

(25) She told me an anecdote just along these

Page 1041

(1) lines because I suggested to her that her husband's (2) law firm's name had come up with Commissioner Stern (3) the other day. And she said she was sort of surprised (4) that that would be a problem.

(5) She said, "I'm working on a brief now with (6) Kevin Forde again. And on the other side is my (7) husband's law firm. So that won't be a problem." (8) I said, "Well, they look at these things (9) differently than perhaps we do in the judiciary (10) because that's a constant problem in the judiciary. (11) And the counsel here might look at it differently." (12) But that's your decision.

(13) Thank you. Ten minutes.

(14) (Whereupon, the foregoing matter went off (15) the record at 2:16 p.m. and went back on (16) the record at 2:28 p.m.)

(17) CHAIRPERSON JIGANTI: Mr. Lane, you may (18) proceed.

(19) MR. LANE: Thank you.

(20) CROSS EXAMINATION

(21) BY MR. LANE:

(22) Q Now, there were somewhere around 35 to 40 (23) cable respondents who had been given the wrong distant (24) signal information in the 1990 study, correct?

(25) **A On the order of 35, I believe.**

Page 1042

(1) Q And none of them expressed confusion about (2) that, with you or someone at Bortz who discovered this (3) error in reviewing the data?

(4) **A I don't know whether they expressed (5) confusion or not.**

(6) Q But no one told you that the operators (7) expressed confusion, nor was there any indication on (8) the questionnaires that there was confusion, was (9) there?

(10) **A I did not supervise the survey. I was not (11) in contact with Burke, so I – I don't – there is no (12) reason that anyone would have informed me if there was (13) confusion.**

(14) Q Now, what was the number – in the 1990 (15) study, what was the number of systems that was (16) selected to represent the entire universe?

(17) **A Well, the 1990 study used a sample drawn (18) from 1989, which included originally 244 systems.**

(19) Q And looking at page 17, what does the 216 (20) number in the paragraph immediately above "key (21) findings" represent?

(22) **A That represents the number of (23) questionnaires which Burke – number of systems which (24) Burke attempted to contact.**

(25) Q Okay. And that's a number less than 244,

Page 1043

(1) right?

(2) **A That's correct.**

(3) Q And what happened to those – what is (4) that, about 28 systems?

(5) **A My understanding is that Burke was unable (6) to locate 28 systems' statements of account at the (7) Copyright Office; therefore – (8) Q So they –**

(9) **A – could not –**

(10) Q I'm sorry.

(11) **A – could not obtain signal carriage data (12) for those systems.**

(13) Q Now, so the – so, originally, you thought (14) that the universe could be represented by 244?

(15) **A I didn't think that.**

(16) Q You didn't have anything to do with the (17) 1989 –

(18) **A Well –**

(19) Q – survey?

(20) **A – in 1989, yes. But, in 1990, I – I did (21) not – did not attempt to administer the survey.**

(22) Q But someone thought that in 1990 the (23) universe could be represented by 244 systems, right?

(24) **A They were working with an original list (25) that had been – that was going to be utilized as the**

Page 1044

(1) **sample that included 244 potential systems.**

(2) Q And of those, only 216 were ever contacted (3) I guess.

(4) **A Were ever attempted to be contacted.**

(5) Q Were ever attempted to be contacted. (6) Okay.

(7) And does that mean for the part of the (8) universe that was represented by the 28 systems there (9) was never any contact made, right?

(10) **A That's correct.**

(11) Q Now, in your studies, did you do any (12) analysis of those 28 systems, in your tabulations?

(13) **A Those 28 systems – no, I did not.**

(14) Q And you knew the identity of those 28 (15) systems, presumably, did you not?

(16) **A Yes, that's correct.**

(17) Q Now, in the 1991 survey, what was the (18) universe or the sample frame that you selected or (19) Bortz selected?

(20) **A 222.**

(21) Q And how many of those did you

attempt to (22) make contact with?

(23) **A 221.**

(24) Q Where is that 222 number, by the way? Say (25) if you do this again for my sake, if you'd put all of

Page 1045

(1) the 1990 in one place, rather than two, it would be (2) really helpful to me.

(3) **A Pardon me?**

(4) Q If you put all of the 1990 data in (5) consecutive pages, rather than forcing me to be (6) flipping back and forth in your testimony, it would be (7) real helpful to me.

(8) ARBITRATOR WERTHEIM: Are you referring (9) now to '91 or '92?

(10) MR. LANE: '91.

(11) THE WITNESS: Well, the 222 is on page 33.

(12) BY MR. LANE:

(13) Q Page 33, right. Now, what accounting (14) period information did you use for picking that?

(15) **A The first accounting period of 1991.**

(16) Q And the 1992 study, if you'd turn to (17) page 34, under the survey section in the second (18) paragraph, are those the correct dates of the survey?

(19) **A In reference to the 1991 survey?**

(20) Q Yes.

(21) **A That is correct.**

(22) Q So those were considerably later than any (23) other survey period for any of the other years, were (24) they not?

(25) **A Any of what other years?**

Page 1046

(1) Q 1990, 1989, 1992, at the time of the year.

(2) **A I – I wouldn't say considerably later. (3) Those surveys were begun in March, or the 1991 survey (4) was begun in March of 1992 and completed by May of (5) 1992. The surveys in other years were generally (6) completed over the December to April period.**

(7) Q Now, do you know in March of 1992 whether (8) you would have had almost all of the remittance sheets (9) for the 1991-2 data?

(10) **A In 1991, yes, we would have had – that (11) was – that was one reason that the survey started (12) when it did, that we obtained all of – essentially (13) all of the remittance sheets for – for the 1991 (14) period, as per the Copyright Office.**

(15) Q And so it would have been possible for you (16) to indicate how much royalties had been paid in 1991 (17) by each of the respondents, correct?

(18) **A Yes, it would have been possible.**

(19) **ARBITRATOR WERTHEIM:**

Excuse me. Do (20) you—

(21) **THE WITNESS:** It would not have been (22) possible to reflect the royalties paid in 1991. It (23) would have been possible to reflect the royalties paid (24) in the first half of 1991.

(25) **BY MR. LANE:**

Page 1047

(1) Q Do you know when the second half of the (2) year royalties are due by?

(3) **A Yes, I do. But I also know that the (4) period March of 1992 was the first period at which all (5) of the remittance records for the – remittance (6) records for the first period of 1991 were available (7) from the Copyright Office.**

(8) Q Is that –

(9) **A The second period are not available for a (10) substantially longer period of time.**

(11) Q You don't know that the second half of (12) each year's royalty fees are due by March 1 of the (13) following year?

(14) **A I know that. But I also – what I am (15) telling you is that the remittance records are not (16) available immediately following the end of the filing (17) period.**

(18) Q You mean in the statement of account (19) records?

(20) **A No, I mean the remittance records.**

(21) Q So I'm confused now. You didn't have the (22) '91-2 remittance sheets by this time?

(23) **A We used the '91 –**

(24) Q By March 4th?

(25) **A We used the '91-1 remittance sheets.**

Page 1048

(1) **Those became available and had been completed – the (2) processing of those records had been completed by the (3) Copyright Office approximately at the beginning of (4) February of that year, for the first period.**

(5) Q For the remittance sheets.

(6) **A Yes, that is correct.**

(7) Q Not for the statement of account (8) information.

(9) **A That's correct.**

(10) Q When did the statement of account (11) information become available for '91-1?

(12) **A I don't know when it first became (13) available. I know that the statement of account (14) information was available at the time that we had (15) obtained all of the**

remittance records.

(16) Q So they were both available at the same (17) time, is that what you're saying?

(18) **A That's correct.**

(19) Q I want to go back to the beginning of your (20) testimony here, work my way through it. I'd like to (21) start on page 4 of your testimony. There you are (22) referring to the 1979 BBD&O study, right?

(23) **A Yes.**

(24) Q And in the second paragraph, or the first (25) full paragraph on page 4, right above "criticisms,"

Page 1049

(1) you indicated that among the other survey questions (2) was one that sports and movies would be carried most (3) substantially in a schedule arranged by the operators (4) themselves. Do you see that?

(5) **A Yes, I do see that.**

(6) Q And what do you mean by that?

(7) **A There was a question in that survey that (8) asked operators if they could arrange a schedule of (9) distant signal programming by themselves, how would (10) they do so?**

(11) Q So one of the questions was, how would you (12) arrange a schedule if you had these programming types?

(13) And then how would you value that schedule? Is (14) that what the sequence was?

(15) **A No.**

(16) Q No? What was the sequence?

(17) **A The sequence was the first question was, (18) how would you value – or, excuse me – how would you (19) arrange a schedule of programming on those distant (20) signals? The second question related to value was, in (21) my understanding, independent. It did not refer (22) specifically to the schedule arranged by themselves.**

(23) Q And in your criticisms of that, was there (24) any criticism of the question about how you would (25) arrange a schedule by yourself?

Page 1050

(1) **A It was not identified in the documents I (2) reviewed.**

(3) Q And was that question also asked in the (4) 1980 BBD&O survey as reflected on page 5 of your (5) testimony in the paragraph right above "criticisms"?

(6) **A Yes, the last sentence of that –**

(7) Q So in those – I'm sorry.

(8) **A The last sentence of that paragraph.**

(9) Q So in those two surveys, the operators (10) were asked how would

they arrange a schedule, right?

(11) **A Yes, they were asked that question.**

(12) Q And then the next survey was in 1983, (13) correct?

(14) **A After the 1980 survey, yes.**

(15) Q And was there any criticism of that (16) question in the 1980 survey?

(17) **A Any – not in the documents that I (18) reviewed.**

(19) Q And in the 1983, Brown, Bortz & Coddington (20) presented the first of what I'll call the Bortz study, (21) correct?

(22) **A Brown, Bortz & Coddington presented it, (23) yes.**

(24) Q And that question was not included, was (25) it?

Page 1051

(1) **A No, it was not.**

(2) Q And do you know why that question was not (3) included?

(4) **A I don't know specifically. I know that (5) the purpose of the survey was an attempt to determine (6) the – was to attempt to determine how the value of – (7) the relative value of programming would be allocated.**

(8) Q And wasn't it to determine the relative (9) value in a free market situation?

(10) **A I don't know if those specific terms were (11) used.**

(12) Q Do you think that operators might want to, (13) if they were buying individual program categories by (14) themselves, arrange it in particular ways that might (15) be different from the way it is arranged now in (16) distant signals?

(17) **A I believe that respondents – if they – (18) are you proposing a hypothetical?**

(19) Q Yes.

(20) **A I believe that respondents may value (21) certain programming more highly than other programming (22) on distant signals; and, therefore, that they might (23) schedule that programming differently than the way it (24) is scheduled now if they had the choice.**

(25) Q If they were operating in a free

Page 1052

(1) marketplace, and there was no compulsory license, they (2) could do that, couldn't they?

(3) **A If – not necessarily on those specific (4) signals.**

(5) Q No. But they could buy programming and (6) create their own channel that looked like a distant (7) signal if they – and they could get any of these (8) program types and put them together into their own (9)

channel, could they not?

(10) **A Theoretically, they could do that, yes.**

(11) Q And what do you understand to be the goal (12) – and I'll just limit this to the – I guess the only (13) one that you're testifying about that you actually (14) worked on that's relevant for this case is the 1991 (15) survey?

(16) **A Are you referring to the surveys conducted (17) between –**

(18) Q That are reported in this – in your (19) testimony.

(20) **A I worked on, as I said in my direct (21) testimony, in a limited role on the 1983 study by BBC, (22) on the 1986 study, and on the 1989, 1991, 1992, and (23) '93 studies.**

(24) Q What did you understand to be the goal of (25) the 1991 and '92 studies?

Page 1053

(1) **A The goal of the studies was to best (2) approximate the task that the tribunal was faced with, (3) which is to allocate royalty payments among the (4) various categories of programming that are at issue in (5) this proceeding.**

(6) Q And is that goal within the context of a (7) compulsory license, or not?

(8) **A The goal was an attempt to, within the (9) fixed dollar amounts that are reflected in royalty (10) payments, replicate what would likely happen in the (11) free marketplace.**

(12) Q So turning to question number 4 on (13) page 54, that relates to the 1991 survey, does it not?

(14) **A Yes.**

(15) Q So the fixed dollar amount referred to in (16) the – I guess it's in the second paragraph of (17) question 4, was that supposed to relate to the royalty (18) payments in your mind?

(19) **A In my mind?**

(20) Q Yes.

(21) **A That was supposed to reflect what (22) percentage an operator would allocate of a fixed (23) dollar amount in their mind –**

(24) Q I understand that. What does –

(25) **A – with this type of programming.**

Page 1054

(1) Q What does the fixed dollar amount mean? (2) What did you think that the fixed dollar amount meant?

(3) **A What – the goal of this question is to (4) instruct the respondent to think in terms of a fixed (5) dollar amount, not me.**

(6) Q I know. But you, in helping to create (7) this study, had an idea of

what you wanted the (8) respondents to think, did you not?

(9) **A We wanted the respondent to think in terms (10) of how they would allocate the value, the value that (11) they held for the programming categories that are (12) listed below.**

(13) Q Okay. And did you want them to just (14) allocate – how did you want them to allocate value, (15) based on what?

(16) **A Based on their judgment of the relative (17) value of the programming.**

(18) Q Without regard to what this fixed amount (19) is?

(20) **A The fixed amount was intended – the fixed (21) amount was at the – was in the perception of the (22) respondent.**

(23) Q And that's what you just wanted, some (24) amorphous perception and each respondent could be (25) different?

Page 1055

(1) **A Not an amorphous perception, a perception (2) of the total value of the programming carried on (3) distant signal.**

(4) Q So were they supposed to think of (5) 100 percent, that's the total value of programming?

(6) **A No. The total value of programming is a (7) fixed dollar amount. They were asked to allocate that (8) in percentage terms.**

(9) Q Okay. But that's – I guess that's my (10) point. You only asked them about percentage. You (11) told them this was relative value. You didn't give (12) them a dollar amount. What does the fixed dollar (13) amount – what does that say to them?

(14) **A I –**

(15) Q How did they identify that? What did you (16) want them to think about?

(17) **A I've already answered that.**

That's their (18) perception of the total value of the programming (19) carried on distant signal.

(20) Q But it has no dollar value.

(21) **A It has a dollar value, which is the total (22) value of programming on distant signals.**

(23) Q Is that the same as their royalty payments (24) paid for those distant signals?

(25) **A It may not be exactly the same.**

Page 1056

(1) Q Did you want them to think of it to be (2) nearly the same? In the context – did you want them (3) to think in the context of royalty payments?

(4) **A I did not want them to think in context of (5) royalty payments, because I did not want them – (6)**

specifically, because I did not want them to have an (7) indication of why they were responding to this (8) question, and that this response to this question (9) might somehow affect the amount of royalty payments (10) that they had to pay, or affect them in some other (11) way. I wanted them to respond in an unbiased manner.

(12) Q And do they have any other context for (13) thinking about the distant signals that you listed for (14) them but in the compulsory license?

(15) **A Excuse me. Could you repeat the question?**

(16) Q You list distant signals for them, (17) correct?

(18) **A That's correct.**

(19) Q And you repeat them at least one other (20) time by the time they're thinking about these (21) percentage terms, right?

(22) **A Yes.**

(23) Q And the only way that they've ever thought (24) about distant signals is in the context of royalty (25) payments, isn't it? There is no other – they have

Page 1057

(1) never purchased them in any other way, have they?

(2) **A They have – they have purchased them in (3) return for copyright fees, yes, as well as payments to (4) satellite distributors in some instances.**

(5) Q In this list of – in the chart that you (6) provided, page 1, did you perform any analysis of the (7) individual respondents to see if there was consistency (8) among individual respondents across here?

(9) **A When you referred to individual (10) respondents, what exactly are you referring to?**

(11) Q People that are individuals who have cable (12) systems that answered the survey in one or more years.

(13) **A Well, if they answered the survey in one (14) year, how could I compare that response across –**

(15) Q Well, if they answered it in –

(16) **A – more than one year?**

(17) Q – two years, you could, couldn't you?

(18) **A Yes.**

(19) Q Did you look at that?

(20) **A I have looked at that, yes.**

(21) Q And is there a consistency there in your (22) mind?

(23) **A I believe that there is.**

(24) Q Okay.

(25) **A There is – we have, in looking at that,**

Page 1058

(1) have determined that between 60 and 70 percent of (2) responses – of respondents who answer the survey on (3) more than one occasion answered within a range of plus (4) or minus 10 points of previous response to the major (5) categories of the programming?

(6) Q And what do you consider the major (7) categories of programming?
(8) A In this survey, live professional and (9) college sports, movies, and syndicated shows, series, (10) and specials. Or I should say that those were the (11) categories which I reviewed the day before.

(12) Q Now, do you still have PBS Exhibit 2-X?

(13) A Yes, I do.

(14) Q If I look at PBS Exhibit 2-X across from (15) 1990 to 1991, to 1992, and I just look at the PBS (16) response column, okay, I just look at the average (17) under that column. It goes from 18 to 14 to 13, (18) right?

(19) A That's correct, yes.

(20) Q And that shows a downward trend, does it (21) not?

(22) A It doesn't show – I can't say that it (23) shows a trend.

(24) Q Well, the number 14 is less than the (25) number 18, correct?

Page 1059

(1) A That is correct.

(2) Q Now, if I look at your Table 1, the (3) numbers for 1990 to '92 go 2.7, 2.9, and 3.0, correct?

(4) A That's correct.

(5) Q And the number 3.0 is greater than the (6) number 2.7, is it not?

(7) A Yes.

(8) Q So that if I looked at one exhibit I would (9) get, at least in my mind, I would – there would be (10) some suggestion that the number is going down, and if (11) I looked at the other table, there is some suggestion (12) the number is going up.

(13) A Well, I don't think you could say that (14) there is some suggestion that the number is going up (15) in the 1990, '91, and '92 overall results. 2.7, 2.9, (16) and 3.0 are highly consistent results, in my view.

(17) Q Are you aware of the fact that the PBS (18) stations are paid for at a particular royalty rate?

(19) A Yes, I am.

(20) Q And you're aware that the – each cable (21) system pays for the entire station when it gets it?

(22) A Yes.

(23) Q Unlike the other program categories, (24) right, except for

Canadians?

(25) A That's my understanding, yes.

Page 1060

(1) Q And did you make any comparison of the (2) royalty payments by the PBS respondents with their (3) percentage allocations to determine whether they were (4) valuing these based on what their behavior was?

(5) A No, I did not make that comparison.

(6) MR. LANE: At this time, Mr. Chairman, I'd (7) like to introduce a one-page exhibit, Exhibit Number (8) 13-X, which is a chart entitled "Comparison of 1992 (9) Bortz Survey," PBS responses with the 1992 royalty (10) payments for PBS of those same systems.

(11) ARBITRATOR WERTHEIM: This is what exhibit (12) number, please?

(13) MR. LANE: 13-X.

(14) ARBITRATOR WERTHEIM: Thank you.

(15) (Whereupon, the above-referred (16) to document was marked as PS (17) Exhibit No. 13-X for (18) identification.)

(19) BY MR. LANE:

(20) Q Now, I understand, Mr. Trautman, that all (21) of the surveys are in the room in those boxes over (22) there.

(23) A Yes.

(24) Q And if you'd like to check these, I'd be (25) happy just – I did make a comparison quickly. If you

Page 1061

(1) want to, you can compare the PBS values with the (2) numbers reported in PBS 2-X, and I'll state for the (3) record that the same – for example, there is 160, and (4) if you match up the various other ones, there's (5) matching numbers.

(6) Now, you understand what a DSE is, do you (7) not, Mr. Trautman?

(8) A Yes, I do.

(9) Q And you know that PBS – each signal is (10) charged at .25 DSE, correct?

(11) A That is correct.

(12) Q And then other signals, depending on the (13) type of signal, are valued either at 1.0 or .25. Do (14) you understand that?

(15) A Yes, I do understand that.

(16) Q And do you know that WTBS, for example, is (17) valued at 1.0 DSE?

(18) A I believe that's correct, yes.

(19) Q So if we look at the fourth line here (20) that's marked 1426, and that – do you recognize that (21) number as one that would correspond to the number – (22) I think you called it the random number for each (23) interview

– to the sequence of random numbers that (24) you used for the '92 study?

(25) A I'm – explain that to me again.

Page 1062

(1) Q In each survey instrument, there had been (2) – someone had placed a number, I assumed that it had (3) been you or someone at Bortz, that I think has been (4) termed a random –

(5) A Yes, a random number. I'm familiar with (6) that.

(7) Q Okay. And these are the random numbers in (8) the left-hand column.

(9) A Yes.

(10) Q Okay. And then you see in the fourth one, (11) 1426, WTBS, and WLIW. Do you see that?

(12) A Yes.

(13) Q And that is the famous 60 percent one, is (14) it not, that you discussed with Mr. Hester earlier (15) today? Received a PBS value in the next to the right- (16) hand column?

(17) A Well, if that is – I'm going to assume (18) that that is correct, yes.

(19) Q And if we measured the DSE value of the (20) PBS signal there of .25 to the total DSE value, that (21) would equate to 20 percent of the royalty payment that (22) was made for that system. That is the calculation (23) that you see there. Okay. Do you – is that accurate (24) in your mind?

(25) A Yes, I see the .25 divided by –

Page 1063

(1) Q And so this person valued PBS signal at 60 (2) percent, although it only accounted for 20 percent of (3) its – of that system's royalty payment. Do you see (4) that?

(5) A That is correct.

(6) Q Okay. And based on an index that has the (7) – simply an index of the value as compared to the (8) actual payment, that would be 300 – based on a 100 (9) index, that would be a 300, would it not?

(10) A Yes. The RF – the payment, however, is (11) not an indicator necessarily of what the operator (12) would be willing to pay for that PBS signal.

(13) Q I'm not saying that it is. It's an (14) indication of what it did pay for the signal, right?

(15) A That's correct.

(16) Q So then, just so we – and you had (17) correctly surmised in your discussion with Mr. Hester (18) that this was likely to be a situation with just a (19) superstation and one PBS station, and that's –

(20) A Yeah, that's correct.

(21) Q – appears to be what happened, right?

(22) A That – that does appear to be

the case.

(23) Q And if we look at the last one on this (24) table, we see the same situation, do we not, WTBS and (25) WVIA? And in that case, the respondent only valued

Page 1064

(1) the PBS station at five percent, correct?

(2) **A Yes, that is correct. But as I discussed (3) with Mr. Hester, that the market conditions could (4) still vary substantially in that you may, in one (5) instance, have a local PBS station already present, (6) and then in another instance not have a local PBS (7) station present.**

(8) Q But in –

(9) **A Which could dramatically affect the value.**

(10) Q But you couldn't just tell from saying if (11) you had one PBS distant signal how a respondent would (12) value it. You couldn't say automatically that would (13) be a high response, could you?

(14) **A No, I wouldn't expect that you'd be able (15) to.**

(16) Q In fact, if we look through here, we see (17) a couple of others which just a single – just go up (18) about eight above the bottom and you see another (19) situation where it was only one PBS station, and it (20) was valued at 15 percent, correct?

(21) **A A relatively high value for PBS, yes.**

(22) Q I'm going to ask you some questions about (23) the – I would move the admission of Program Suppliers (24) Exhibit 13-X.

(25) MR. NEIMAN: Your Honor, we object to the

Page 1065

(1) admission of this exhibit.

(2) CHAIRPERSON JIGANTI: You do?

(3) MR. NEIMAN: Yes, we do. We have not had (4) an opportunity to verify it. We also would like a (5) sponsoring witness to, you know, explain the percent (6) to PBS/DSE column to us. We think that, you know, the (7) actual amount that a cable systems royalty would be (8) reduced by dropping a PBS signal, for example, might (9) not be the same as simply dividing the total DSE (10) column by the PBS/DSE column. We would like a witness (11) who can explain how these numbers were calculated (12) before the – to sponsor this exhibit.

(13) MR. LANE: I think the witness explained (14) that.

(15) CHAIRPERSON JIGANTI: Just one moment.

(16) MR. LANE: I'm sorry.

(17) CHAIRPERSON JIGANTI: We have another (18) objection. Let's hear all of the objections.

(19) MR. HESTER: Yes, Your Honor. For the (20) record, Timothy Hester, we would have an objection as (21) well to this on the basis that it lacks a sponsoring (22) witness. I don't believe Mr. Trautman is able to (23) sponsor this, because there is a lot of information (24) here that I don't think he can attest to.

(25) MR. STEWART: Mr. Chairman?

Page 1066

(1) CHAIRPERSON JIGANTI: Yes.

(2) MR. STEWART: I would also object on a (3) slightly different ground. As Mr. Lane characterized (4) certain numbers on this exhibit, which he prepared as (5) relating to how much the cable operator paid in (6) royalties, and because of the fact that royalties are (7) paid at different rates, you can't get there from (8) looking at the total DSE's without more information.

(9) And that – that goes to the question of (10) having a sponsoring witness to answer questions about (11) more of the details, such as whether there are 3.75 (12) signals involved, and the like. So I would object on (13) the grounds that there is no proper sponsoring witness (14) to ask questions about the import of these numbers.

(15) CHAIRPERSON JIGANTI: Okay. Mr. Lane, do (16) you wish to respond?

(17) MR. LANE: Mr. Chairman, I would be happy (18) to have, if we have the time, even if we don't, I'd be (19) happy to have Mr. Trautman go through those individual (20) – they're all over here in these boxes. That's what (21) has been sitting over there – the individual – what (22) are they called? Questionnaires, and they are all (23) identified, and we can take the time and he can verify (24) that these call signals were there.

(25) The witness did identify that he

Page 1067

(1) understood how the percent PBS/DSE column had been (2) derived. It's a simple – it's pretty simple. It's (3) just a division of the first two columns. The PBS (4) value is exactly what – the same as reported on PBS (5) Exhibit 2-X, just a slightly different format. But if (6) you went down that row of numbers for the PBS value, (7) compared it with 2-X, you would see it was exactly the (8) same. And the index has been explained. It's a very (9) simple calculation as well.

(10) CHAIRPERSON JIGANTI: What's in the boxes (11) over there?

(12) MR. LANE: Those are, as I understand it, (13) the – if you look at the back of Mr. Trautman's (14) testimony, they are the filled out –

(15) CHAIRPERSON JIGANTI: Oh.

(16) MR. LANE: – the questionnaires, but (17) they're actually filled out.

(18) ARBITRATOR WERTHEIM: I don't recall (19) hearing an explanation of the index column.

(20) MR. LANE: The index column, Judge, is (21) simply the division of the PBS/DSE column by the (22) percent PBS/DSE. So just to take in a simple example (23) the first one, 1426 that we discussed, you'll see 60 (24) divided by 20 would be three times, and then just for (25) index, base of 100.

Page 1068

(1) MR. STEWART: Mr. Chairman?

(2) CHAIRPERSON JIGANTI: Just one moment.

(3) Say that again about the – about what (4) you –

(5) MR. LANE: Okay. The formula is simply (6) you took 60 percent divided by 20 percent –

(7) CHAIRPERSON JIGANTI: Where do you get the (8) 60 percent?

(9) MR. LANE: Okay. You see, I'm just taking (10) a simple example. 1426 –

(11) CHAIRPERSON JIGANTI: Yes.

(12) MR. LANE: – it's the fourth one down, (13) the first one I discussed with Mr. Trautman.

(14) CHAIRPERSON JIGANTI: Yes. I'm sorry.

(15) MR. LANE: 60 divided by 20 is three, and (16) then for just a base of 100 as your – just a common (17) use for an index, that gives you 300.

(18) CHAIRPERSON JIGANTI: All right.

(19) MR. LANE: If you made the calculations, (20) you would see they were the same down the chart.

(21) CHAIRPERSON JIGANTI: Mr. Stewart?

(22) MR. STEWART: Based on that further (23) explanation, I would also oppose the introduction of (24) this exhibit on the basis of relevance, dividing the (25) first column by the second column to get the third

Page 1069

(1) column, and then the third column by the fourth column (2) to get the fifth column. It just is not – it has not (3) been established that this has any relevance to this (4) proceeding.

(5) CHAIRPERSON JIGANTI: Okay. And do you (6) have any further statement to make?

(7) MR. NEIMAN: Just to reiterate briefly, (8) Your Honor, this third column, percentage PBS/DSEs, it (9)

may be a mathematical calculation. But to followup on (10) what Mr. Stewart said, it's not a mathematical (11) calculation that has any meaning, that has any (12) relevance necessarily to a royalty payment. And, (13) therefore, we object to it without a sponsoring (14) witness to explain what its relevance is. (15) CHAIRPERSON JIGANTI: Is there any dispute (16) with the fact that this information, and then all of (17) the columns before it says PBS/DSEs, is information (18) that is available here in this room today?

(19) MR. NEIMAN: Well, we could check it with (20) the diaries that are here, Your Honor.

(21) CHAIRPERSON JIGANTI: All right. But (22) you're only – the only question is checking it (23) against the diaries that are here, is that correct?

(24) MR. NEIMAN: In terms of verifying the (25) numbers in the first two columns, Your Honor. The

Page 1070

(1) calculations then would have to be checked as well.

(2) MR. LANE: Now, also, the PBS value column (3) would be listed there.

(4) MR. NEIMAN: That's right.

(5) CHAIRPERSON JIGANTI: All right. The (6) motion to admit will be allowed.

(7) MR. NEIMAN: Your Honor, we'd like the (8) opportunity to verify the diaries over the weekend and (9) simply report back on that.

(10) CHAIRPERSON JIGANTI: All right.

(11) Certainly, that would be fine. But do you – (12) concerning the examination today, do you view that as (13) affecting the examination here now?

(14) MR. NEIMAN: He can proceed with the (15) examination.

(16) CHAIRPERSON JIGANTI: All right. Maybe at (17) this time, because we need to take a break anyway, (18) we'll take a 10-minute break.

(19) (Whereupon, the proceedings were off the (20) record from 3:10 p.m. until 3:24 p.m.)

(21) CHAIRPERSON JIGANTI: Mr. Lane, you may (22) proceed.

(23) MR. LANE: Thank you. May we go off the (24) record for a moment, Mr. Chairman.

(25) CHAIRPERSON JIGANTI: Yes.

Page 1071

(1) (Whereupon, the proceedings were off the (2) record briefly.)

(3) CHAIRPERSON JIGANTI: I guess we're back (4) on the record.

(5) MR. LANE: Okay. At this time, (6) Mr. Chairman, as I start off this line, I'd like to (7) introduce as Program Suppliers Exhibit 14-X – let me (8) just

stand here with Mr. Trautman before I give it to (9) you.

(10) (Whereupon, the above-referred (11) to document was marked as PS (12) Exhibit No. 14-X for (13) identification.)

(14) BY MR. LANE:

(15) Q This is the random number survey 129, is (16) it not, Mr. Trautman –

(17) A Yes, it's that –

(18) Q – for –

(19) A – that way.

(20) Q And this is for 1990, correct?

(21) A The 1990 survey, yes.

(22) Q So it's a multi-page document, and it is (23) a completed questionnaire from the 1990 survey. And (24) this is a survey that you would have reviewed, would (25) you not, Mr. Trautman?

Page 1072

(1) A Well, this was, again, one of the surveys (2) that was executed in the Burke study. But we did (3) enter and tabulate the results that Burke obtained, (4) so, yes, I have seen these questionnaires.

(5) Q Just turn to the second page of (6) Exhibit 14-X for a minute, please. The first page (7) of –

(8) A The title page of the questionnaire?

(9) Q Right. We'll get back to the first page (10) in a minute, but –

(11) Do you see in the interviewer line there (12) the number 1922?

(13) A Yes.

(14) Q Does that refer to a specific interviewer?

(15) A Yes, it does.

(16) Q Were the same interviewers – did the same (17) interviewers do the surveys in 1989, '90, '91, '92, (18) and '93?

(19) A I believe there was –

(20) Q Same group?

(21) A There were some individuals who were (22) interviewing on the survey in more than one year, and (23) others who have interviewed in only one year.

(24) Q And part of your responsibility is (25) training the interviewers, is it not?

Page 1073

(1) A It is in the years 1989, '91, '92, and (2) '93.

(3) Q Now, let's just turn back to the first (4) page for a moment of Exhibit 14-X, and that is the (5) page that, I don't know, it looks like somebody put

(6) some stick 'em pages on another page and copied it, (7) doesn't it?

(8) A Yes, it appears that way.

(9) Q Okay. Now, do you know what this page (10) represents, what it purports to represent?

(11) A Well, generally, the page

would be more in (12) a standardized form, but this appears to be a call (13) record associated with this survey.

(14) Q And could you tell us what a call record (15) is?

(16) A This is a record of their attempts to (17) contact the individual at this system that they were (18) – a respondent at this system.

(19) Q Okay. So the first line is 1922, and (20) that's the same as the interviewer that – on the line (21) on the second page, right?

(22) A Yes.

(23) Q Okay. So could you just describe what the (24) first line tells us on page 1 of Exhibit 14-X?

(25) A Yes. The statements – or it appears to

Page 1074

(1) say that they telephoned a phone number and that what (2) they – on the date of January 2nd, it appears, at (3) 11:39 a.m., and that they were told it was not a cable (4) system.

(5) Q Okay. Now, turning to the second page, do (6) you see there is a line marked telephone number?

(7) A Yes.

(8) Q When the interviewer gets this (9) questionnaire, when the interviewer who had number 129 (10) got this questionnaire, would that telephone number be (11) filled in?

(12) A Yes, it would, from – we fill in that (13) from a source known as the Television Fact Book, and (14) that information is compiled – the Television Fact (15) Book comes out approximately February of each year, (16) and they have information for purportedly every cable (17) system in the United States.

(18) Q And could you just briefly describe how (19) the fact book is set up for the panel? I don't think (20) they've ever seen one.

(21) A Yes. Within each, they list cable systems (22) in alphabetical order by state within the fact book.

(23) And, for instance, in Alabama, under the Birmingham (24) system, you might have a listing, and it would include (25) the name of the cable system, the address, the

Page 1075

(1) telephone number, and a series of other pieces of (2) information about the cable system, such as the number (3) of channels that the system – the capacity – the (4) channel capacity of the system, the number of channels (5) that the system carries, the type of channels

that the (6) system carries, etcetera. (7) It also includes information as to at the (8) time that they were able to get in touch with the (9) system, who the general manager of the system was. (10) Sometimes it also has information as to other (11) executives at the system.

(12) Q Is the other information above that filled (13) out on the second – on the second page of (14) Exhibit 14-X, do you see above it we have system name, (15) city and state, subscribers, remit number, (16) respondent's name, position. Are those filled out at (17) the time that the interviewer first gets this, before (18) the call is made?

(19) A Well, in the years that Bortz & Company (20) executed the survey, which does not include this year, (21) those – that information is filled out at the time (22) that we provide the questionnaires to Burke. I – I (23) cannot say what was filled out and what wasn't (24) specifically with regard to this survey. I don't (25) know. It appears that it had been, because it –

Page 1076

(1) Q And you did the 1993 survey? You (2) supervised that, did you not?

(3) A Yes, I did.

(4) Q Okay. I'd like to introduce at this time, (5) as Program Suppliers Exhibit 15-X, Mr. Trautman, does (6) this appear to be random number 1349 questionnaire (7) from the 1992 survey?

(8) A 1992? Yes, it does.

(9) MR. LANE: I'd like to introduce that and (10) move the admission of both 14-X and 15-X into (11) evidence. (12) (Whereupon, the above-referred (13) to document was marked as PS (14) Exhibit No. 15-X for (15) identification.)

(16) CHAIRPERSON JIGANTI: Any objections (17) concerning the admission of Exhibits either 14 or 15?

(18) BY MR. LANE:

(19) Q Mr. Trautman, do you recognize 15-X as the (20) questionnaire – (21) CHAIRPERSON JIGANTI: Excuse me, Mr. Lane. (22) There is a motion pending. I don't know if counsel (23) has had an opportunity to examine the exhibit. Would (24) you prefer that we wait and reserve the ruling on the (25) motion to admit?

Page 1077

(1) MR. STEWART: We have no objection.

(2) MR. NEIMAN: No objection, Your Honor.

(3) CHAIRPERSON JIGANTI: Any objections? (4) Everybody prepared to – seeing no dissent, both (5) Exhibits

Number 14 and 15 will be admitted into (6) evidence.

(7) (Whereupon, the above-referred (8) to documents, previously marked (9) as PS Exhibits Nos. 14-X and (10) 15-X for identification, were (11) received into evidence.)

(12) BY MR. LANE:

(13) Q And this – and you supervised the 1992 (14) interviewing?

(15) A Yes, I did.

(16) Q And I think you earlier referred to a (17) regularized call sheet. Is that what the first two (18) pages of Exhibit 15-X –

(19) A Yes, that's correct.

(20) Q Is that –

(21) A Call record, yes.

(22) Q Now, let's just stay with the call record, (23) and this is one that you're familiar with the form, (24) are you not?

(25) A Yes.

Page 1078

(1) Q And could you just go across the top of (2) the columns and tell us what each one means?

(3) A Well, the left-hand column essentially, in (4) my understanding, refers to the – a first busy signal (5) received by a caller. The INV period number refers to (6) the interviewer number. In some instances, (7) interviewers may write in their initials or – as (8) appears to have been the case here in some cases. The (9) date refers to the date on which they are attempting (10) to contact a respondent. Time refers to the time they (11) attempted to contact.

(12) And then the categories going across the (13) – I believe there are nine – refer to disposition of (14) the call. RNA, for example, indicates respondent not (15) available, DISC would indicate disconnected, BZ would (16) indicate busy, etcetera. The final column prior to (17) the disqualifier would indicate – is where they are (18) supposed to indicate a complete –

(19) Q And actually, in the way that you read (20) this is this is the last page of the call sheet, (21) right?

(22) A Yeah, actually, that's correct in this (23) case, yes.

(24) Q Okay. So if we turn to the second page of (25) Exhibit 15-X, is that where it really starts with the

Page 1079

(1) call sheet?

(2) A That's right. The first contact was (3) January 5, 1993, and –

(4) Q Okay. And this is –

(5) A – proceeding from there.

(6) Q If we started on that second page in the (7) first line, this appears to

be our friend 1922, right, (8) the same interviewer?

(9) A Same interviewer, I would –

(10) Q I mean, he has a pretty – he or she has (11) a pretty distinctive way of writing 22.

(12) A Yes.

(13) Q And that matches with 14-X, right?

(14) A That's correct.

(15) Q Okay. Just tell us what happened in that (16) first line, the way that you understand it.

(17) A On page 1 or on page –

(18) Q Page 1. I'm sorry. Page 2, the first (19) chronological –

(20) A All right. It appears that the respondent (21) was not available and was noted to be in a meeting.

(22) Q So they called on –

(23) A January 5, 1993, at 9:11 a.m., and (24) determined that the respondent was not available and (25) in a meeting.

Page 1080

(1) Q Okay. So that we know because they put an (2) X in the RNA column –

(3) A Yes.

(4) Q – and that means respondent not (5) available.

(6) A That's correct.

(7) Q And then somebody wrote "in a meeting."

(8) A That's correct.

(9) Q Now, do you see about four lines down from (10) that the respondent was not available, but it says (11) triple zero I guess. What does – and then it appears (12) right below that again. What does that mean? Do you (13) see – it's in the 22 date line.

(14) A Yes, I see the reference. I'm not (15) familiar with that designation.

(16) Q Okay. Now, in the –

(17) CHAIRPERSON JIGANTI: Which one are you (18) referring to? I missed it.

(19) BY MR. LANE:

(20) Q Okay. If you look in the fifth – fourth (21) and fifth line – fifth lines down on the page, the (22) first column in both instances says 2474, and then the (23) next – the date column is 2/2, and then one is at (24) 9:58, and I take it that is in the morning, and 4:11 (25) in the afternoon, Mr. Trautman, is that right for

Page 1081

(1) those two entries?

(2) A It appears to be correct, yes.

(3) Q And in both cases there is an X in the (4) RNA, respondent not available, and then right next to (5) that we see triple zeros. And I'm just wondering if (6) that was some sort of

secret code that only surveyors (7) knew.

(8) CHAIRPERSON JIGANTI: Could that be an 800 (9) number?

(10) MR. NEIMAN: If I might suggest it looks (11) like it could be three O's.

(12) MR. LANE: It could be three O's, right. (13) It's much more exciting as triple zeros.

(14) THE WITNESS: Actually, that – that does (15) appear to be what it is.

(16) ARBITRATOR FARMAKIDES: And it's late in (17) the day. Could you kindly tell me, how is this log (18) sheet identified with the specific questionnaire (19) involved?

(20) THE WITNESS: It is attached to the cover (21) of the questionnaire.

(22) ARBITRATOR FARMAKIDES: Oh. So all of (23) these records, all of these listings here, had to do (24) with this attachment?

(25) THE WITNESS: That's correct. Each –

Page 1082

(1) each sheet, each survey, and, of course, they don't (2) all require two call sheets, but each – each survey (3) has its own call record.

(4) ARBITRATOR FARMAKIDES: Thank you.

(5) BY MR. LANE:

(6) Q And that call record relates to only one (7) respondent – attempt to – not one attempt to, but (8) one respondent ultimately being contacted, right?

(9) A That is correct.

(10) Q Now, do you see down maybe about the (11) seventh line it's 2/4/93? It says left 800 number, is (12) that accurate –

(13) A Yes.

(14) Q – in my reading? Do you have, or does (15) Burke Marketing have, an 800 number?

(16) A Yes, they do.

(17) Q And are your interviewers instructed to (18) leave that number with the respondent and ask the (19) respondent to call back?

(20) A They can do that. Generally, we instruct (21) them to do that after a period of time of having (22) difficulty reaching a respondent, if the respondent is (23) – is difficult to reach.

(24) Q Okay. And how many tries before they are (25) instructed to leave that 800 number?

Page 1083

(1) A That – there is not a specific (2) instruction as to that. It's a determination that the (3) interviewer and the supervisor can make.

(4) Q Okay. And then ultimately we go

through (5) – this respondent was called, I don't know how many (6) times, but I guess we could count it up at some point, (7) but ultimately it appears on the first page that on (8) April 5, 1993, we finally get an X in the completion (9) column, right?

(10) A That's correct.

(11) Q Okay. Let's just –

(12) A And let me correct that the 800 number is (13) not necessarily left with the respondent. It – in (14) all likelihood, it was left with the respondent's (15) secretary.

(16) ARBITRATOR WERTHEIM: I may be quick to – (17) but before you attempt to reach this person, is that (18) unusual, for it to be that many before the interview (19) was complete?

(20) THE WITNESS: That's actually at the very (21) high end of the range, yes. I – I believe we said in (22) our report up to 30 callbacks were made, so I – I had (23) apparently counted. So I think on very few occasions (24) would there have been more than 30.

(25) BY MR. LANE:

Page 1084

(1) Q Okay. Let's just go through the (2) questionnaires just for the – seeing how it's filled (3) out.

(4) A And –

(5) Q I'm sorry.

(6) A Excuse me. Let me finish answering that (7) question as well. But as you can see here, that (8) direct contact was not made with the respondent during (9) these contacts. This was an attempt to call – these (10) attempts reflected calls to the system itself.

(11) Q Okay. Now, when the interviewer calls, do (12) they ask for the respondent by name?

(13) A They have been provided, based on the name (14) of the general manager that is listed in the TV Fact (15) Book, they can ask for that individual by name on (16) their first contact with the system.

(17) Q And is that what they're instructed to do?

(18) A Yes, it is.

(19) Q And then you ask that person, if we go (20) through the questionnaire, are you the person most (21) responsible for programming decisions made by your (22) system during 1992, or not?

(23) A That's correct.

(24) Q What happens if you get to that point and (25) they say no?

Page 1085

(1) A Then, in that instance, the person that (2) was contacted, and who then said they were not most (3)

responsible, the interviewer would ask that individual (4) to refer them to the person at the system who was most (5) responsible for programming decisions.

(6) Q Then we turn to the next page, and I take (7) it the call letters have already been filled in by (8) someone prior to the interview starting?

(9) A That's correct.

(10) Q And where is that information obtained?

(11) A That information is obtained from (12) statements of account available at the Copyright (13) Office, and is completed by Bortz & Company.

(14) Q Okay. Then the next question is the – (15) what is the most popular?

(16) A Yes.

(17) Q Okay. And this one you don't – there is (18) no reading of the list of program types that are (19) listed there to the respondent, is there?

(20) A No, there is not.

(21) Q And whatever the interviewer hears, he or (22) she translates to one of those, or if they can't they (23) put it in the other, is that correct?

(24) A That's correct.

(25) Q And then we go to the next question, and

Page 1086

(1) that's the one about, do you advertise? And that's (2) just a yes or no?

(3) A Yes. Do you feature distant signal (4) programming in your advertising efforts?

(5) Q And in this case, it was a no, so you (6) didn't ask the next series of questions?

(7) A That's correct.

(8) Q Then we go to the next and final page, and (9) that's the allocation question, right?

(10) A That's correct.

(11) Q And the survey, for all practical (12) purposes, were identical – the sequence of the (13) questions – for each of the year 1989 through 1993, (14) is that right?

(15) A The sequence of questions 1, 2, 3, and 4, (16) that is – that is correct. There was an addition in (17) 1989 to ask the individual, because they were read, (18) the stations carried in the second half of 1988 to – (19) if they added or dropped any systems during the year (20) 1989.

(21) Q And you indicate – I'm sorry.

(22) A Any signals, I'm sorry. I said systems.

(23) Q And you indicate on page 15 that these (24) surveys took five to 10 minutes, is that – right at (25) the top on

the second bullet?

Page 1087

(1) **A Well, that was the characterization that (2) was made in – in the criticism in the survey.**
 (3) Q Well, is it inaccurate that they took five (4) to 10 minutes?
 (5) **A I think, for 1992, the range was probably (6) more like 10 to 15 minutes.**
 (7) MR. LANE: Those are all the questions I (8) have, Mr. Chairman.
 (9) CHAIRPERSON JIGANTI: Thank you, Mr. Lane.
 (10) Any other questions?
 (11) MR. HESTER: Your Honor, there was, in the (12) introduction of his Exhibit 13-X, which relates to PBS (13) – and I know that hopefully there wouldn't be two (14) rounds of examination. I wanted to ask for the (15) panel's dispensation and be able to ask a clarifying (16) question or two on that exhibit.
 (17) CHAIRPERSON JIGANTI: 13?
 (18) MR. HESTER: 13-X, which was the (19) comparison of the survey responses for PBS with the (20) royalty payments.
 (21) CHAIRPERSON JIGANTI: What is it you –
 (22) MR. HESTER: I have already gone through (23) with this witness once, so I wanted to ask leave to (24) ask a question or two on a further examination of the (25) witness in response to this examination exhibit that

Page 1088

(1) Mr. Lane has introduced.
 (2) CHAIRPERSON JIGANTI: Any objections?
 (3) MR. NEIMAN: We have no objection, Your (4) Honor.
 (5) MR. HESTER: Thank you.
 (6) CHAIRPERSON JIGANTI: You may inquire.
 (7) CROSS EXAMINATION
 (8) BY MR. HESTER:
 (9) Q Mr. Trautman, Timothy Hester again, for (10) Public Television. I wanted to focus on three entries (11) here. The first one is the fourth line down on (12) Exhibit Program Suppliers 13-X, which shows WTBS and (13) WLIW for call signs. Do you see that one?
 (14) **A Yes.**
 (15) Q And the value reflected in the column over (16) to the right-hand side of that page for that cable (17) system is 60 percent for PBS, do you see that?
 (18) **A Yes. Again, assuming these numbers are (19) correct.**
 (20) Q Right. And I take it you're not in a (21) position as we sit here to confirm

the accuracy of (22) these call signs?
 (23) **A No, I'm not.**
 (24) Q But for purposes of these questions, why (25) don't you accept the –

Page 1089

(1) **A Sure.**
 (2) Q – accuracy of them. Is that acceptable (3) to you?
 (4) **A I'll do that.**
 (5) Q Okay. So you see that one with two call (6) signs. Do you recognize WLIW as a non-commercial (7) station, public television station?
 (8) **A I – I believe it's a Long Island station, (9) but I'm not – I'm not – I'm a little bit unsure (10) there.**
 (11) Q Okay. And then –
 (12) ARBITRATOR WERTHEIM: A Long Island public (13) television station?
 (14) THE WITNESS: Yes, I believe that's (15) correct.
 (16) BY MR. HESTER:
 (17) Q And I take it under the methodology of (18) your survey, anybody who has given a value here for (19) PBS would, by definition, have carried a public (20) television signal during the survey year. In other (21) words, one of these call signs must be a public (22) television station.
 (23) **A That's – oh, yes, certainly.**
 (24) Q Is that right?
 (25) **A Yes, that's correct.**

Page 1090

(1) Q And we know TBS is not.
 (2) **A That's right.**
 (3) Q Okay. I wanted to ask you further down on (4) the same page, actually the last line, the other (5) example Mr. Lane had pointed you to, which shows WTBS (6) and WVIA, do you see that one?
 (7) **A Yes.**
 (8) Q And there the value shown for PBS is five (9) percent?
 (10) **A Yes.**
 (11) Q Could you explain whether the results for (12) these two examples I've just focused on are, in your (13) view, consistent? In other words, can you explain why (14) you would see a ranking of 60 percent for one cable (15) system and a ranking of five percent for another with (16) these patterns of distant signal carriage?
 (17) **A Well, we can't fully judge the – the (18) response based simply on the information here. But (19) it's not inconsistent that the responses could vary by (20) that much, because it's very possible that in the case (21) of WLIW – and again, I'm not specifically familiar (22) with that station, but it – in the case of WLIW, it (23) may be, for this cable system,**

the only available (24) public television station. There may be no local (25) market station, in which case it could be very

Page 1091

(1) **valuable.**
 (2) **That may not be the case at all in the (3) case of WVIA. It could be being imported into a (4) market with one or even two or three public television (5) stations already in that market, and in that case you (6) wouldn't be likely to get a particularly high value.**
 (7) Q So what you don't see on this page is the (8) profile of local signals that the cable system is also (9) carrying?
 (10) **A That's right.**
 (11) Q And I take it you also don't see the (12) profile of cable networks that the system may be (13) carrying?
 (14) **A No, we don't.**
 (15) Q So you could see variation. It's not (16) explainable simply by looking at the pattern of those (17) call signs?
 (18) **A Yeah, absolutely.**
 (19) MR. HESTER: Thank you. Those are all the (20) questions I have.
 (21) ARBITRATOR WERTHEIM: I have a couple of (22) questions about this exhibit. As I understand it, the (23) first two columns of this exhibit tell us, or rather (24) the first three columns, tell us what proportion of (25) the total royalties paid for importing distant

Page 1092

(1) signals, each of these systems pays for importing a (2) PBS distant signal. Is that the way you would read (3) this?
 (4) For example, this fourth one down, 20 (5) percent of the royalties that he pays for distant (6) signals goes for WLIW.
 (7) THE WITNESS: No, I don't believe that (8) that can – that is what is attempted to be being (9) shown here, but I don't think that's a correct (10) calculation necessarily.
 (11) ARBITRATOR WERTHEIM: How would you regard (12) that?
 (13) THE WITNESS: Well, there are differences (14) in the amount that one pays as a percentage of their (15) gross receipts, depending on the number of signals (16) that are carried. And, therefore, this ratio is not (17) precise. This ratio does not provide – necessarily (18) provide an indication of – of the proportion of their (19) royalty payment that would be attributable to PBS.
 (20) ARBITRATOR WERTHEIM: Well, if there are (21) only two signals carried, two distant signals, (22) wouldn't this be an accurate reflection of the portion (23)

of royalties paid for the public station?
(24) THE WITNESS: I'm not certain of the exact (25) calculations involved.

Page 1093

(1) ARBITRATOR WERTHEIM: Well, on the face of (2) it, number four seems to illustrate that the value (3) allocated by this respondent to public television, if (4) he were allocating a program budget for distant (5) signals, is three times as much as he's actually (6) paying to import a distant public signal. Would you (7) agree that's what it appears to show?

(8) THE WITNESS: Well, that's – that's what (9) the ratio attempts to show. I think that –

(10) ARBITRATOR WERTHEIM: For them to (11) correspond exactly, every one of these indexes would (12) have to have been 100.

(13) THE WITNESS: That – that is correct.

(14) ARBITRATOR WERTHEIM: In that regard, you (15) would –

(16) THE WITNESS: Assuming that the percent (17) PBS/DSE's column is an accurate reflection.

(18) ARBITRATOR WERTHEIM: And the people who (19) have it indexed below 100 are, in fact, allocating, by (20) this calculation, a greater share of their budget to (21) PBS than they state they would.

(22) THE WITNESS: Well, I don't really think (23) that you can compare these numbers. I – I think (24) that –

(25) ARBITRATOR WERTHEIM: Well, that's what

Page 1094

(1) I'm trying to find out. Why couldn't you?

(2) THE WITNESS: Well –

(3) ARBITRATOR WERTHEIM: Why are these (4) inferences not the proper inferences to draw?

(5) THE WITNESS: Because I think that the (6) cable operator has not made a decision about what they (7) pay to actually import these signals. That is a (8) specified rate that they – essentially is defined by (9) the rules associated with copyright royalties that (10) they – they have to pay, whereas a value judgment (11) reflects to them their measure of what they would be (12) willing to pay.

(13) ARBITRATOR WERTHEIM: Okay. Thank you.

(14) ARBITRATOR FARMAKIDES: I have the same (15) problem with that. This I understood to be taken from (16) the Bortz survey. It compares the Bortz survey, PBS (17) responses, with the royalty payments for PBS. Isn't (18) that what the heading states at the top?

We're (19) talking about –

(20) THE WITNESS: Well, that's what Mr. Lane (21) has characterized this as.

(22) ARBITRATOR FARMAKIDES: Yes. And you were (23) suggesting that you disagree with that?

(24) THE WITNESS: Well, I think that these (25) ratios that – my understanding is that it's not –

Page 1095

(1) you can't do as simple a calculation as what has been (2) done here to determine the percent PBS/DSEs figure.

(3) ARBITRATOR FARMAKIDES: Well, you see, I (4) read it much like Judge Wertheim. Here we have a – (5) we have two signals, one rated at one and the other (6) one at a quarter, and you have one and a quarter. And (7) you get an index of 300 if you, in fact, divide one by (8) the other, and it's a three.

(9) So what is it about this that you're – (10) you're actually saying that the underlying information (11) that led to this is something that you are not only (12) unfamiliar with but it did not come from the Bortz (13) survey?

(14) THE WITNESS: Well, there is nothing (15) directly on the Bortz survey that – that provides the (16) information of PBS/DSEs and total DSEs. You could (17) make that calculation from the signal carriage (18) information on – on our survey.

(19) But what I'm saying is that the – as (20) additional signals are added, particularly in a case (21) where you have a lot of signals carried, which many of (22) these are instances of – of many more distant signals (23) than you would find on average, the percentage for the (24) nth station that is – that is paid as a percentage of (25) the – as a percentage of their gross receipts, of the

Page 1096

(1) system's gross receipts, declines.

(2) And, therefore, to do this simple (3) calculation, which simply compares the PBS distant (4) signal equivalent to the total distant signal (5) equivalent is not, in my understanding of it, an (6) accurate calculation. I –

(7) ARBITRATOR FARMAKIDES: Mr. Lane, you just (8) heard my questions, too, along with Judge Wertheim's (9) questions.

(10) MR. LANE: I'll be happy to –

(11) ARBITRATOR FARMAKIDES: Could you clarify (12) what you had in mind, sir?

(13) MR. LANE: I'd be happy to question the (14) witness, and I think that will clarify it.

(15) ARBITRATOR FARMAKIDES: All right.

(16) BY MR. LANE:

(17) Q Let's look at the fourth line. Which is (18) the first DSE? Well, let's go back for a minute. Is (19) it your understanding that the DSE rates are declining (20) as you carry more DSEs?

(21) A That was –

(22) Q Isn't that what you are talking about (23) in –

(24) A That was my understanding, yes.

(25) Q Right. Which one of those two is the

Page 1097

(1) first DSE and which one is the second DSE?

(2) A I am not familiar with how those (3) designations are made.

(4) Q Is there any way you could designate which (5) is the first and which is the second?

(6) A I am not certain of that.

(7) Q Have you seen statements of accounts? You (8) review them, don't you, to pick out the signal (9) carriage?

(10) A I review them for the signal carriage (11) information.

(12) Q Do you notice – have you ever noticed, in (13) all the years you've been doing it, someplace where (14) they mark what's the first DSE and what's the second (15) DSE?

(16) A I haven't seen that designation.

(17) Q So there is no way you can tell, is there, (18) which signal is the (quote) "first DSE" at the higher (19) rate and which is the second signal at the next (20) declining rate, is there?

(21) A No, there is not. But there is a – to (22) the system, who is making the payments, there is a (23) marginally lower payment to add a signal than to have (24) one less signal. So whether they're designated as the (25) first system – as the first or second or third or

Page 1098

(1) fourth signal or not is not the issue here. In – if (2) a system is deciding whether to carry a fifth signal (3) instead of only four signals, that would affect their (4) rate.

(5) Q But that's not what we're trying – we're (6) attempting to do here, is it? We're just saying in (7) 1992 they carried these signals.

(8) A What you're attempting to do is you are (9) trying to determine what the cable operator paid for (10) a particular PBS signal. And without knowing what – (11) what judgment they made and whether they added that (12) signal as their fifth signal, or

whether they – they (13) treated it in that manner, you can't make a judgment (14) like this.

(15) Q We know what their total royalties were in (16) that year, don't we?

(17) A Yes, we do.

(18) Q And we know that they're total royalties (19) because these are all Form 3 systems – was based on (20) the number of distant signals they carried, don't we?

(21) A Yes, we do know that.

(22) Q And in the case of the fourth one, with (23) WTBS and WLIW, we know that their total DSE value was (24) 1.25, right?

(25) A That is correct.

Page 1099

(1) Q Now, do we know which of those two – is (2) there any way that you can state that WLIW is the (3) first distant signal?

(4) A It's precisely my point, is that the (5) operator's – the operator's judgment in terms of (6) making a decision about carriage, in the case of all (7) of these signals, is affected, in essence, by where he (8) ranks these signals. I mean, if he – if he believes (9) that adding a signal at the margin will cost a certain (10) amount, he knows that that will cost less than adding, (11) say, the second signal.

(12) So there is – there is a different cost, (13) depending on – on where those systems fit into his (14) overall mix, or where those signals –

(15) Q But there is no different cost on a past (16) period where the royalty was fixed and the DSE value (17) was fixed, is there?

(18) A Because those different ratios are (19) computed into the total payment that he paid for that (20) period, of course there are. I'm not talking about (21) the calculation that goes on to the statement of (22) account. I'm talking about the value judgment that (23) relates to how many distant signals the operator chose (24) to carry in that year, which –

(25) ARBITRATOR WERTHEIM: So you're saying, in

Page 1100

(1) effect, this third column, percent of PBS/DSEs, cannot (2) be equated to the percent of royalties attributed to (3) PBS/DSE.

(4) THE WITNESS: That the operator would (5) attribute. And not in my survey, that the operator (6) would attribute when – when he actually considered (7) his budget, his overall

operating budget for that (8) year. I don't think that we can equate those two.

(9) ARBITRATOR WERTHEIM: If the same royalty (10) fee had to be paid for every imported DSE, then these (11) figures would correspond to the share of royalty funds (12) paid by the operator.

(13) THE WITNESS: I believe that would be (14) correct, although there are –

(15) ARBITRATOR WERTHEIM: Is there any other (16) variation besides the one you've mentioned that – the (17) decline in value for each added signal, and we don't (18) know where in the chain the PBS signal was brought in?

(19) THE WITNESS: Well, there is no other (20) variation as far as the table specifically. But I (21) also think that, again, what we don't know is the (22) rationale behind the carriage decision. For example, (23) the carriage decision is considered – that relates to (24) the royalty payment itself is considered in the (25) context of the operator's entire programming lineup.

Page 1101

(1) And he may be comparing – while he may not within the (2) distant signal group value, he may value it within the (3) distant signal programming, the PBS at one level.

(4) When he looks at what he has to pay for (5) the PBS signal, let's say since PBS does count, let's (6) just assume that this quarter of a DSE is correct. If (7) my numbers are right, that could work out to as little (8) as a penny per subscriber. That would still make that (9) PBS signal less expensive than almost any cable (10) network he might carry.

(11) So even if he didn't attribute it as that (12) valuable within the mix of distant signal programming, (13) he might still carry it relative – because his other (14) options out there were – were more expensive. So I (15) don't think this is a valid comparison is my answer – (16) the bottom line.

(17) Q Is there any way that you know, then, that (18) we could assign the amount of royalties attributable (19) to the carriage of WTBS?

(20) A Assign the amount of royalties that are (21) attributable to the carriage –

(22) Q To the carriage of WTBS as a distant (23) signal. Is there any way that we could do that?

(24) A I'm not sure what that has to do with (25) this.

Page 1102

(1) Q Well, you know, there is a sports

exhibit (2) on that. There's a lot of testimony on that. There (3) was value assigned, royalty dollars assigned to WTBS (4) and to every other station, and it was –

(5) A I understand that calculation. What I'm (6) saying is that –

(7) Q What is that calculation, as you (8) understand it?

(9) A I – I understand that you can make that (10) calculation, just as you've made a calculation here. (11) What I'm saying is that you can't relate that (12) calculation, in the case of PBS, to the value that the (13) operator assigns to PBS for the reason that I just (14) explained, for the reasons.

(15) Q But of the total royalty paid, we could (16) determine, could we not, how much should be assigned (17) to the PBS station, just as we could determine how (18) much would be assigned to WTBS and WGN, WOR, and the (19) other flagship stations, could we not?

(20) A I believe that you probably could, yes.

(21) Q And would you –

(22) CHAIRPERSON JIGANTI: Excuse me. You'd do (23) that how? By looking on the –

(24) THE WITNESS: Well –

(25) CHAIRPERSON JIGANTI: – where on the form

Page 1103

(1) it fits and what category?

(2) THE WITNESS: What I am saying is that in (3) terms of the – you could make the same kind of (4) calculation that has been done here. Again, that (5) would not correlate necessarily to the operator's (6) ranking when he is making his judgments about how many (7) signals he is going to carry, and what signals he is (8) going to – distant signals he might or might not (9) carry. (10) ARBITRATOR WERTHEIM: So similar data (11) based on royalties attributed to WTBS would be subject (12) to the same weakness that you've identified here (13) concerning the PBS data in this exhibit.

(14) THE WITNESS: In terms of the royalties (15) assigned to WTBS, I – I believe that the – again, (16) what I'm saying is that the calculation here (17) calculates specifically related to the royalty paid. (18) What it does not do is get into the mind of the cable (19) operator, in terms of it does not take the next step (20) and get into the mind of the cable operator and, (21) again, separate from my survey as to where he puts –

(22) ARBITRATOR WERTHEIM: But this exhibit –

(23) THE WITNESS: That signal.
 (24) ARBITRATOR WERTHEIM: – instead of in (25) columns 1, 3, and 4, puts the PBS/DSEs percentages and

Page 1104

(1) values, it listed TBS –
 (2) THE WITNESS: Well, the calculation was –
 (3) ARBITRATOR WERTHEIM: – increases in – (4) of how the – of how to interpret column 3, the (5) percentage of TBS/DSEs.
 (6) THE WITNESS: I think that you would have (7) to say that you could make the same interpretation.
 (8) ARBITRATOR WERTHEIM: Thank you.
 (9) MR. LANE: Those are all the questions (10) that I had.
 (11) CHAIRPERSON JIGANTI: Anyone else have any (12) questions of Mr. Trautman?
 (13) Mr. Stewart?
 (14) MR. STEWART: I find this very (15) frustrating, because there is a significant set of (16) facts regarding the interpretation of this exhibit (17) that has not been brought out by Mr. Lane. And since (18) the witness didn't prepare this exhibit, I won't be (19) able to elicit that information from him, and I'd like (20) to know by what procedure I can bring that information (21) out.
 (22) CHAIRPERSON JIGANTI: Could you be more (23) specific? I'm not quite certain what your – you (24) know, what your frustration is with –
 (25) MR. STEWART: The other significant

Page 1105

(1) variation in the rates case, the 3.75 rate, which by (2) law doesn't apply to PBS stations; and, therefore, (3) there is no way that you could ever equate the (4) percentage PBS/DSEs with the percentage of PBS (5) royalties, without knowing more information that's not (6) presented in this exhibit.
 (7) CHAIRPERSON JIGANTI: What does that have (8) to do with Mr. Trautman?
 (9) MR. STEWART: This exhibit, PS 13-X, has (10) been admitted into evidence as sponsored by (11) Mr. Trautman.
 (12) CHAIRPERSON JIGANTI: Yes.
 (13) MR. STEWART: The fact that the – that it (14) does not present 1992 royalty payments for PBS in the (15) column labeled "Percentage PBS/DSEs," because of this (16) difference which is a matter of law, it means that it (17) is – if it's cited for what Mr. Lane has presented it (18) for, it will be misleading.
 (19) ARBITRATOR WERTHEIM: Can't

you cross (20) examine Mr. Trautman about that?

(21) CHAIRPERSON JIGANTI: Sure, yes. And the (22) record is replete with the concerns of the witness.
 (23) MR. STEWART: Mr. Trautman was asked (24) whether he was aware of other variations in the rates (25) and he said no.

Page 1106

(1) ARBITRATOR WERTHEIM: Well, maybe he (2) overlooked that one. If you want to ask him about – (3) I don't know. I have no idea. Maybe he is not (4) familiar with it at all and couldn't answer. But we (5) don't know, so ask him.
 (6) ARBITRATOR FARMAKIDES: The problems that (7) Mr. Trautman has I think are very clearly stated in (8) the record. We just want to clarify this document.
 (9) CHAIRPERSON JIGANTI: And whether it's (10) accurate or not. Unless your – is your objection to (11) the competency of this document? Or is it – it (12) sounds as though, I gather to my colleagues, it (13) certainly sounds that way to me. It sounds like it's (14) – your question concerns the weight of it. And I (15) think you can – you can attack that.
 (16) But if I'm in error and it affects the (17) competency of this document, the document shouldn't be (18) admitted for competency –
 (19) MR. STEWART: If I may have leave, then, (20) to ask the witness, and then perhaps I'll know whether (21) the witness is capable of answering my questions. I'm (22) sorry to have – may I have leave to ask a few further (23) questions?
 (24) CHAIRPERSON JIGANTI: Sure.
 (25) CROSS EXAMINATION

Page 1107

(1) BY MR. STEWART:
 (2) Q Mr. Trautman, if you would look at the – (3) first, do you know whether – do you know about the (4) 3.75 percent royalty rate?
 (5) A I am generally familiar with it.
 (6) Q And that's a rate that is substantially (7) higher than the basic rates that you've been (8) discussing?
 (9) A That is my understanding.
 (10) Q Do you know whether the 3.75 rate is ever (11) paid for a PBS station?
 (12) A I am not entirely clear on that.
 (13) Q If it were the case – let me drop back (14) for a moment. Mr. Lane was suggesting that if you – (15) since that if you couldn't tell which signal were (16) carried first, you could simply allocate the total (17) royalties to all the distant signals carried in equal (18) measure,

and then the percentage PBS/DSEs that he has (19) calculated here would be equivalent to the percentage (20) of royalties paid for the PBS station. Is that your (21) understanding of what he was suggesting?

(22) A That is correct.

(23) Q Now, if it were the case that by law the (24) 3.75 rate would not be paid for a PBS station, but (25) were in fact paid for one of the other stations, could

Page 1108

(1) you make that same calculation and assume it would be (2) equivalent to this percentage?
 (3) A Based on your example, I don't believe so, (4) no.
 (5) MR. STEWART: Thank you.
 (6) CHAIRPERSON JIGANTI: Thank you, (7) Mr. Stewart. Any other questions of Mr. Trautman? (8) Did you have a question?
 (9) MR. SATTERFIELD: The Canadian Claimants, (10) Kendall Satterfield for the Canadian Claimants.
 (11) MR. NEIMAN: Your Honor, if I may, just (12) before Mr. Satterfield begins, excuse me.
 (13) Mr. Lane, can I ask you who prepared that (14) document?
 (15) MR. LANE: Would you like me to answer, (16) Mr. Chairman?
 (17) CHAIRPERSON JIGANTI: It's certainly out (18) of order. The document – well, I don't think it's (19) appropriate at this time.
 (20) MR. NEIMAN: Okay, Your Honor.
 (21) CROSS EXAMINATION
 (22) BY MR. STEWART:
 (23) Q You just had a question about the 3.75 (24) royalties. Did your study attempt to exclude those (25) systems that pay 3.75 royalties from the study?

Page 1109

(1) A No, it did not.
 (2) Q So were the valuations made by the (3) operators in your system to be applied to the total (4) royalty fund?
 (5) A They – well, the valuations were intended (6) – yes, the total royalty payment was the factor used (7) in the estimation procedures that we use.
 (8) ARBITRATOR WERTHEIM: That's what was used (9) in weighting it, as well as the –
 (10) THE WITNESS: That's correct.
 (11) MR. SATTERFIELD: There's been an exhibit (12) admitted by Program Suppliers, Program Suppliers 10-X (13) – may I approach the witness to –
 (14) CHAIRPERSON JIGANTI: If it's been (15) admitted as Exhibit 10, it –
 (16) MR. SATTERFIELD: 10-X.
 (17) CHAIRPERSON JIGANTI: – here, I have it. (18) I don't have it here on the

bench. Would you – (19) you're asking for it now? Oh, this is – you have the (20) document, right?
 (21) MR. SATTERFIELD: Right, I have the (22) document. I just wanted to show it to the witness.
 (23) CHAIRPERSON JIGANTI: Yes, I recall that (24) document. 10-X is for Form 3's, or is that the –
 (25) MR. SATTERFIELD: That's the form for

Page 1110

(1) Form3's.
 (2) CROSS EXAMINATION
 (3) BY MR. SATTERFIELD:
 (4) Q Turn to page 11, and I believe if you look (5) at the material at the top left-hand corner of page 11 (6) that tells you how to compute the base rates – the (7) base rate fee.
 (8) **A Yes.**
 (9) Q Could you just take a second and review (10) that?
 (11) **A All right.**
 (12) Q Now, is this what you were testifying to (13) a few minutes ago about the sliding scale in the (14) calculation of the base rate royalties?
 (15) **A Yes. I was not familiar enough with it to (16) know the exact percentages, but this is in general (17) what I was referring to, yes.**
 (18) Q Just for the record, could you read that (19) portion of the exhibit with the – starting with the (20) bullet down through the heading "Partially Distant (21) Stations"?
 (22) **A "If none of the stations were partially (23) distant, calculate your base rate fee" – am I reading (24) the right place?**
 (25) Q Right.

Page 1111

(1) **A – "according to the following rates. For (2) the systems permitted DSEs, as reported in Block B, (3) Part6, or from Part 5, whichever is applicable. (4) First DSE, .893 percent of gross receipts. Each of (5) the second, third, and fourth DSEs, .563 percent of (6) gross receipts. The fifth and each additional DSE, (7) .265 percent of gross receipts."**
 (8) Q Okay. So after the first DSE, there is a (9) change in the rate, is that correct?
 (10) **A That's correct.**
 (11) Q And then the next change in the rate is (12) after the fourth DSE.
 (13) **A That's correct.**
 (14) Q Okay. Now, is it your testimony that the (15) valuations made by the cable operator in response to (16) your question 4 accurately reflect the valuation that (17) the cable operator placed on the programming of the (18)

channels – distant signals that he selected to carry?

(19) **A Could you repeat your statement? I'm not (20) sure I – I got the whole thing.**

(21) Q Is it your opinion that when the cable (22) operator answered question 4 on your survey –

(23) **A Yes.**

(24) Q – that he was accurately estimating or (25) allocating the value of the programming on the distant

Page 1112

(1) signals that he chose to carry?
 (2) **A Yes, that is my testimony.**
 (3) MR. SATTERFIELD: I don't think I'm going (4) to have any further questions at this time.
 (5) CHAIRPERSON JIGANTI: Thank you.
 (6) Any other questions for Mr. Trautman?
 (7) Thank you, Mr. Trautman. You are excused.
 (8) (Whereupon, the witness was excused.)
 (9) CHAIRPERSON JIGANTI: Are there any other (10) housekeeping matters? I assume there are no other (11) witnesses today. There are no other witnesses listed. (12) You're a witness? No.
 (13) (Laughter.)
 (14) MR. LANE: Mr. Garrett gets sworn in –
 (15) MR. GARRETT: That will be the day.
 (16) (Laughter.)
 (17) ARBITRATOR WERTHEIM: The rules say you (18) can't be sworn in.
 (19) MR. GARRETT: No, I just wanted to make, (20) for the record, a statement, Your Honor. As the panel (21) may know, the Copyright Office had directed the MPAA (22) to provide us with the underlying database for the (23) Nielsen study that they're relying upon in this (24) proceeding. The database was supposed to have been (25) turned over on November 17.

Page 1113

(1) On December 1st, we finally received (2) something that we sent over to the computer company. (3) It's actually Cable Data Corporation. It did not (4) appear to have all of the data in it necessary to (5) verify the results of that study. We have, in the (6) past couple of days here, talked with Mr. Lane here to (7) try to clarify exactly what is missing and what we (8) need.
 (9) We are doing some runs over the weekend (10) here, to see whether or not we can proceed, even (11) though we don't appear to have the entire database. (12) And I simply want to

make known for the record where (13) we stand on that matter. If I can work it out with (14) Mr. Lane, I certainly will. If not, we're going to (15) have to file a motion regarding that.
 (16) And given the fact that it is a rather big (17) study, and a lot needs to be done for Mr. Lane's (18) witnesses up here, we would require a ruling as (19) promptly as the panel could give us one on that. But (20) I don't want my silence on this issue here to suggest (21) that – that everything is okay, or that we're not (22) actively attempting to work out the issues at this (23) point.
 (24) We did file another motion directed at the (25) other matter. This was the advertising data that

Page 1114

(1) underlies Mr. Sieber's testimony. We filed that, but (2) today I can't serve all of the counsel on that. Just (3) a statement for the record.
 (4) CHAIRPERSON JIGANTI: All right. Anything (5) further today? Have a good weekend.
 (6) (Whereupon, at 4:29 p.m., the proceedings (7) in the above-entitled matter were adjourned.)

Look-See Concordance Report

 UNIQUE WORDS: 2,098
 TOTAL OCCURRENCES: 12,090
 NOISE WORDS: 385
 TOTAL WORDS IN FILE: 36,712

 SINGLE FILE CONCORDANCE

 CASE SENSITIVE

 INCLUDES ALL TEXT OCCURRENCES

 IGNORES PURE NUMBERS

 WORD RANGES @ BOTTOM OF PAGE

\$

\$100 [1] 934:18
 \$5 [1] 944:10

0

0% [1] 974:11

1

1-X [3] 1016:10; 1024:14; 1025:1
 1/2 [1] 993:6
 10% [2] 971:22; 974:10
 10-minute [2] 1039:25; 1070:18
 10-X [3] 1109:12, 16, 24
 100% [3] 975:6, 9; 989:9
 100percent [1] 1055:5
 10:00 [1] 956:17
 10:49 [1] 956:8
 11:11 [1] 956:8
 11:39 [1] 1074:3
 12:07 [1] 993:19
 13-X [8] 1060:8, 13, 17; 1064:24;
 1087:12, 18; 1088:12; 1105:9
 13.71% [1] 976:2
 14-X [7] 1071:7, 12; 1073:4, 24;
 1076:10; 1077:9; 1079:13
 15-X [7] 1076:5, 10, 14, 19; 1077:10,
 18; 1078:25
 17% [2] 977:17, 18
 17.6% [1] 977:17
 18% [1] 977:14
 1988-2 [2] 1032:9, 23
 1990-1 [3] 1032:18, 23, 25
 1991-2 [1] 1046:9
 1:13 [1] 994:2
 1A [1] 932:1
 1st [1] 1113:1

2

2-X [10] 973:1, 11; 994:7; 996:7;
 1008:5; 1058:12, 14; 1061:2; 1067:5, 7
 2/2 [1] 1080:23
 2/4/93 [1] 1082:11
 20% [3] 943:20, 21; 944:7
 25% [2] 948:10; 975:2
 251.48F4 [1] 911:25
 2:16 [1] 1041:15
 2:28 [1] 1041:16
 2nd [1] 1074:2
 2X [2] 978:3; 990:15

3

30% [5] 951:23; 974:10; 975:1, 2; 978:8
 30s [1] 1009:24

33-34 [1] 1030:9
 34% [1] 951:18
 36-38% [1] 951:16
 37% [1] 951:15
 38.8% [1] 916:3
 39% [1] 940:13
 3:10 [1] 1070:20
 3:24 [1] 1070:20
 3A [1] 963:17
 3B [1] 963:19
 3C [1] 963:19
 3D [1] 964:1

4

40% [1] 939:16
 4:11 [1] 1080:24
 4:29 [1] 1114:6
 4th [1] 1047:24

5

5% [6] 974:11; 975:1, 2; 978:24
 50% [1] 974:9
 50s [1] 1009:24

6

60% [3] 978:11, 16, 21

7

70% [1] 939:13
 7X [1] 932:16

8

89% [1] 953:5

9

91-1 [2] 1047:25; 1048:11
 91-2 [1] 1047:22
 93% [1] 941:20
 97% [1] 982:9
 9:11 [1] 1079:23
 9:39 [1] 910:2
 9:58 [1] 1080:24

A

A-F-T-E-R-N-O-O-N [1] 994:1
 a.m. [5] 910:2; 956:8; 1074:3; 1079:23
 ABC [2] 1006:17, 18
 ability [2] 981:22; 995:24
 able [16] 939:14, 21; 985:3, 18; 986:1,
 2; 994:23; 1000:12; 1001:10; 1002:15;
 1005:20; 1064:14; 1065:22; 1075:8;
 1087:15; 1104:19
 above-entitled [1] 1114:7
 above-referenced [2] 932:11; 973:9
 above-referred [4] 1060:15; 1071:10;
 1076:12; 1077:7
 absolute [8] 930:2, 6; 1001:1; 1002:24;
 1003:17; 1015:3; 1016:15; 1027:14
 absolutely [1] 1091:18
 accept [1] 1088:25
 acceptable [1] 1089:2
 accord [2] 965:11; 984:23
 accorded [4] 926:13; 936:16; 937:24;
 943:3
 according [1] 1111:1
 account [9] 938:24; 976:23; 1043:6;
 1047:18; 1048:7, 10, 13; 1085:12;
 1099:22
 accounted [3] 939:13; 977:15; 1063:2
 accounting [2] 1045:13, 15

accounts [1] 1097:7
 accuracy [3] 943:17; 1088:21; 1089:2
 accurate [7] 1016:19; 1062:23;
 1082:12; 1092:22; 1093:17; 1096:6;
 1106:10
 accurately [2] 1111:16, 24
 achieve [1] 939:15
 achieves [1] 966:12
 actively [1] 1113:22
 actual [8] 915:12; 918:5; 977:7; 1001:6;
 1017:1, 23; 1063:8; 1065:7
 ad [1] 947:18
 add [1] 1097:23
 added [8] 934:23; 950:14; 987:24;
 1086:19; 1095:20; 1098:11; 1100:17
 adding [2] 1099:9, 10
 addition [5] 911:23; 955:19; 1006:21;
 1035:1; 1086:16
 additional [4] 933:1; 950:15; 1095:20;
 1111:6
 address [2] 945:10; 1074:25
 addressed [1] 955:18
 adjourned [1] 1114:7
 adjustment [1] 1032:6
 adjustments [1] 972:16
 administer [1] 1043:21
 administration [1] 923:13
 administrative [3] 952:15; 1039:13, 15
 admission [9] 994:4, 7, 22; 995:14;
 1024:18; 1064:23; 1065:1; 1076:10, 17
 admit [3] 910:9; 1070:6; 1076:25
 admitted [11] 910:17; 928:21; 994:16;
 996:3; 1015:16; 1024:21; 1077:5;
 1105:10; 1106:18; 1109:12, 15
 advanced [1] 916:1
 advertise [1] 1086:1
 advertising [6] 934:8; 947:13, 15, 16;
 1086:4; 1113:25
 affairs [2] 928:7; 935:3
 affect [6] 947:23; 976:10; 1056:9, 10;
 1064:9; 1098:3
 affected [1] 1099:7
 affecting [1] 1070:13
 affects [1] 1106:16
 affiliate [4] 1006:5, 16, 18; 1007:16
 aforementioned [2] 996:4; 1024:23
 afternoon [2] 997:1; 1080:25
 agency [1] 934:8
 aggregate [1] 944:23
 agree [2] 979:2; 1093:7
 agreed [2] 968:20; 1034:1
 agreement [2] 916:8; 968:17
 air [2] 982:22; 1004:15
 Alabama [1] 1074:23
 allocate [13] 934:17; 944:18; 971:19;
 979:21; 1007:13, 20; 1053:3, 22;
 1054:10, 14; 1055:7; 1107:16
 allocated [6] 949:6; 967:25; 1008:12;
 1027:10; 1051:7; 1093:3
 allocating [4] 989:2; 1093:4, 19;
 1111:25
 allocation [35] 936:22; 938:16; 939:23;
 940:9, 14; 942:20; 946:1; 949:25;
 951:12, 15; 955:21; 957:13; 959:24;
 963:9, 17, 19; 965:3; 971:16; 973:17;
 974:13; 1015:1, 7, 8, 22; 1016:15, 22;
 1017:3, 7, 17, 19; 1018:19; 1021:5, 19,
 20; 1086:9
 allocations [14] 928:4; 934:3; 938:16;
 942:16; 944:22; 951:21; 953:5, 7, 11;
 964:10; 968:1; 969:7; 1024:4; 1060:3

allow [1] 985:24
 allowed [7] 929:1; 961:19; 962:22;
 964:21; 965:13; 985:18; 1070:6
 allows [1] 985:20
 allusion [1] 911:10
 alphabetical [1] 1074:22
 ambiguous [1] 913:25
 amend [8] 928:11, 15, 23; 961:10, 14,
 19; 964:17; 965:10
 amended [5] 961:20, 21; 962:21; 963:3
 amendment [1] 962:17
 amendments [1] 962:14
 amorphous [2] 1054:24; 1055:1
 amount [19] 939:23; 967:24; 1053:15,
 23; 1054:1, 2, 5, 18, 20, 21; 1055:7, 12,
 13; 1056:9; 1065:7; 1092:14; 1099:10;
 1101:18, 20
 amounts [1] 1053:9
 analysis [6] 920:19; 923:22; 924:12;
 926:9; 1044:12; 1057:6
 analyzed [2] 997:7, 8
 anecdote [1] 1040:25
 Angeles [1] 1002:2
 announced [1] 919:14
 answer [13] 976:6; 977:11; 982:13;
 1017:23; 1023:10; 1028:1; 1029:7;
 1030:22; 1058:2; 1066:10; 1101:15;
 1106:4; 1108:15
 answered [7] 939:23; 1055:17;
 1057:12, 13, 15; 1058:3; 1111:22
 answering [2] 1084:6; 1106:21
 answers [7] 1022:12, 24; 1026:9, 16;
 1029:6, 10, 14
 anticipating [1] 957:16
 anybody [3] 914:8; 933:17; 1089:18
 anytime [1] 962:19
 anyway [1] 1070:17
 anywhere [2] 1004:14; 1018:11
 apologize [3] 1025:3, 6, 20
 apparent [1] 970:25
 apparently [1] 1083:23
 appeal [3] 921:13; 1004:1; 1040:23
 appealing [1] 1004:15
 appear [5] 1063:22; 1076:6; 1081:15;
 1113:4, 11
 appearance [1] 935:12
 appeared [3] 926:14; 945:6; 1007:21
 appears [15] 953:10; 1014:1; 1063:21;
 1073:8, 12, 25; 1074:2; 1075:25;
 1078:8; 1079:7, 20; 1080:11; 1081:2;
 1083:7; 1093:7
 Appendix [2] 913:10, 11
 appendix [1] 1013:6
 applicable [2] 949:4; 1111:3
 application [1] 946:16
 applied [7] 952:9; 972:22; 976:12;
 1017:18; 1031:6; 1032:17; 1109:3
 apply [3] 915:21; 926:10; 1105:2
 applying [2] 1017:16; 1032:7
 appreciate [1] 910:13
 approach [5] 945:20, 21; 949:4;
 970:16; 1109:13
 appropriate [7] 928:16; 942:10; 952:13;
 971:9; 976:16; 994:13; 1108:19
 approximate [1] 1053:2
 approximately [12] 924:3; 939:13, 22;
 951:23; 953:5; 954:20; 982:6; 1035:7,
 25; 1037:9; 1048:3; 1074:15
 approximating [1] 982:8
 April [2] 1046:6; 1083:8
 ARBITRATOR [109] 917:16, 21; 918:16;

919:11, 17; 927:25; 932:23; 933:2;
 935:8, 17; 938:13; 940:5, 15; 946:6, 19,
 24; 947:2, 7; 949:11; 953:13; 954:8, 12;
 957:16, 21; 959:20, 25; 960:3, 8, 21;
 964:8; 967:11; 968:10; 970:24; 974:16;
 975:10;
 978:11; 981:8; 982:5, 15, 20, 25; 983:24,
 25; 984:8; 985:7, 15, 23; 986:15, 23;
 987:8; 988:19; 996:19; 1002:22; 1003:15;
 1005:16; 1016:2; 1018:10, 21; 1019:1, 22;
 1020:7, 15, 24; 1021:6; 1023:6; 1033:9,
 16, 19, 22; 1034:4; 1045:8; 1046:19;
 1060:11, 14; 1067:18;
 1081:16, 22; 1082:4; 1083:16; 1089:12;
 1091:21; 1092:11, 20; 1093:1, 10, 14, 18,
 25; 1094:3, 13, 14, 22; 1095:3; 1096:7,
 11, 15; 1099:25; 1100:9, 15; 1103:10, 22,
 24; 1104:3, 8; 1105:19; 1106:1, 6; 1109:8;
 1112:17
 area [6] 1005:3; 1019:6, 8, 10, 11;
 1030:4
 areas [1] 920:18
 argument [3] 916:1, 9; 917:3
 arguments [1] 916:10
 arrange [6] 1049:8, 12, 19, 25; 1050:10;
 1051:14
 arranged [3] 1049:3, 22; 1051:15
 asking [10] 913:24; 915:15, 16; 955:22;
 961:13; 989:21; 1013:9; 1030:17;
 1109:19
 asks [1] 971:12
 aspect [3] 911:17; 914:9; 922:5
 assess [2] 921:9; 922:11
 assessing [3] 921:5, 8, 21
 assessment [3] 921:12; 926:12; 929:20
 Assign [1] 1101:20
 assign [6] 969:25; 975:8; 977:17;
 980:18; 1007:25; 1101:18
 assigned [19] 968:6, 7, 13; 970:21;
 972:3; 974:9, 25; 976:4; 980:4; 982:11;
 989:9; 992:16, 20, 25; 1102:3, 16, 18;
 1103:15
 assigning [1] 980:24
 assignment [5] 969:18; 970:3, 8;
 992:11; 995:6
 assigns [2] 971:13; 1102:13
 assist [1] 921:17
 associated [2] 1073:13; 1094:9
 Association [2] 997:3; 1038:20
 assume [5] 913:13; 1062:17; 1101:6;
 1108:1; 1112:10
 assumed [2] 920:5; 1062:2
 Assuming [2] 984:1; 1093:16
 assuming [3] 972:19; 1020:15; 1088:18
 assumption [1] 1020:18
 assure [1] 1040:10
 attached [1] 1081:20
 attachment [1] 1081:24
 attack [1] 1106:15
 attempt [10] 1043:21; 1044:21; 1051:5,
 6; 1053:8; 1082:7; 1083:17; 1084:9;
 1108:24
 attempted [7] 939:9; 1002:6; 1042:24;
 1044:4, 5; 1078:11; 1092:8
 attempting [5] 949:5; 1078:9; 1098:6,
 8; 1113:22
 attempts [3] 1073:16; 1084:10; 1093:9
 attention [5] 950:7; 958:16; 959:5;
 999:13; 1013:9
 attest [1] 1065:24
 attitudinal [1] 969:13

attractive [1] 1009:5
 attributable [5] 954:2, 5; 1092:19;
 1101:18, 21
 attribute [3] 1100:5, 6; 1101:11
 attributed [3] 937:3; 1100:2; 1103:11
 automatic [7] 969:18; 970:3, 8; 972:3,
 21; 992:11, 25
 automatically [3] 970:21; 992:20;
 1064:12
 availability [3] 954:17; 982:19, 22
 available [26] 919:20; 923:16; 927:5;
 933:5; 980:10; 981:18; 1004:6, 10;
 1038:7; 1047:6, 9, 16; 1048:1, 11, 13,
 14, 16; 1069:18; 1078:15; 1079:21, 24;
 1080:5, 10; 1081:4; 1085:12; 1090:23
 average [15] 975:17, 19, 21, 23; 976:2,
 3, 6, 7; 1001:7; 1018:16, 17, 20;
 1058:16; 1095:23
 averages [1] 976:10
 award [3] 915:17; 1012:15, 22
 awards [2] 994:25; 995:5
 aware [8] 939:3; 957:19; 980:22;
 1032:8, 11; 1059:17, 20; 1105:24

B

bachelor [1] 923:14
 background [2] 923:11; 1038:8
 Bar [1] 1038:19
 Bardwell [2] 947:1; 1028:10
 base [6] 1067:25; 1068:16; 1110:6, 7,
 14, 23
 Based [3] 1054:16; 1068:22; 1108:3
 based [15] 924:12; 949:3, 7; 969:13;
 1032:1, 6, 24; 1054:15; 1060:4; 1063:6,
 8; 1084:13; 1090:18; 1098:19; 1103:11
 bases [1] 911:5
 basic [5] 931:7; 937:19; 986:13; 1107:7
 basically [3] 951:13, 21; 955:11
 basis [16] 911:1, 4; 915:17; 921:19;
 943:4; 944:23; 946:15; 955:4; 978:9;
 980:22; 985:6; 995:13; 1035:9; 1036:3;
 1065:21; 1068:24
 basketball [1] 1039:10
 BBC [29] 923:1; 941:4, 6, 11, 18, 20;
 942:6; 943:23; 945:2, 12, 15; 947:5;
 948:13, 17; 950:18, 21; 958:17, 21, 22;
 966:24; 967:8; 971:18; 997:19; 1012:2,
 12, 19; 1014:1, 2; 1052:21
 BBD [2] 1048:22; 1050:4
 BBDO [11] 925:22; 934:7; 936:16, 19;
 937:3; 939:9, 14, 20; 941:13; 953:24;
 997:13
 beforehand [1] 918:20
 beginnings [1] 953:9
 begins [1] 1108:12
 begun [4] 954:21; 955:4; 1046:3, 4
 behalf [2] 914:16; 997:2
 behavior [1] 1060:4
 behind [2] 915:2; 1100:22
 believe [51] 916:7; 918:7; 924:2; 926:5;
 939:12; 940:4; 941:17; 944:8; 953:25;
 958:10; 959:5; 965:2; 973:13; 976:5, 18;
 982:8, 12; 984:22; 989:18, 20, 22;
 991:7, 10; 992:23; 998:12; 1003:8;
 1012:10, 17; 1016:4, 23; 1023:23;
 1026:6; 1028:4;
 1041:25; 1051:17, 20; 1057:23; 1061:18;
 1065:22; 1072:19; 1078:13; 1083:21;
 1089:8, 14; 1092:7; 1100:13; 1102:20;
 1103:15; 1108:3; 1110:4
 believes [1] 1099:8

bench [1] 1109:18
 besides [1] 1100:16
 Birmingham [1] 1074:23
 bit [8] 910:6; 935:14; 936:13; 956:5;
 980:20; 1018:15; 1040:22; 1089:9
 blackboard [1] 993:10
 Block [1] 1111:2
 blocks [1] 910:11
 blue [2] 943:14; 958:11
 Book [3] 1074:13, 15; 1084:15
 book [2] 1074:19, 22
 Bortz [71] 912:5, 12, 17, 24; 913:24;
 914:6, 16, 24; 915:10, 16; 917:23;
 919:7; 920:16, 17, 21; 921:23, 24;
 922:8, 21, 22, 24; 923:1; 926:18, 19;
 936:10; 940:16, 20; 941:18; 945:11;
 947:5; 948:9, 23; 949:1; 950:17; 951:3;
 952:21; 955:17; 957:8;
 971:18; 972:6; 973:19, 24; 986:24;
 987:16; 989:13; 991:8, 15; 995:16;
 1010:18; 1015:13, 19; 1031:19; 1033:1,
 24; 1034:5, 11; 1042:2; 1044:19; 1050:19,
 20, 22; 1060:9; 1062:3; 1075:19; 1085:13;
 1094:16; 1095:12, 15
 bothered [1] 956:24
 bound [2] 953:18; 1019:7
 boundaries [2] 946:22; 1019:9
 boxes [3] 1060:21; 1066:20; 1067:10
 break [6] 956:4, 25; 1038:1; 1070:17,
 18
 brief [3] 916:16, 17; 1041:5
 briefly [8] 914:13; 950:11; 987:16;
 989:7; 1000:24; 1069:7; 1071:2;
 1074:18
 broad [2] 986:14; 988:13
 broadcast [3] 922:13; 955:1; 987:11
 Broadcasters [1] 997:3
 broadcasters [1] 980:21
 broadcasting [2] 980:22; 984:4
 broader [6] 1029:6, 10, 12, 14, 15, 23
 Brown [4] 923:1; 1038:25; 1050:19, 22
 budget [5] 974:10; 1093:4, 20; 1100:7
 build [1] 941:12
 bullet [2] 1086:25; 1110:20
 bundles [1] 1006:7
 Burke [16] 926:20; 951:1; 973:20;
 1033:14, 16; 1034:3; 1035:25; 1037:11;
 1042:11, 23, 24; 1043:5; 1072:2, 3;
 1075:22; 1082:15
 business [4] 916:25; 921:19; 923:12;
 988:7
 busy [2] 1078:4, 16
 Butte [4] 1002:1; 1005:13; 1007:25;
 1008:2
 buy [3] 954:21; 987:4; 1052:5
 buying [1] 1051:13
 BZ [1] 1078:15

C

C-O-M-B [1] 1040:3
 Cable [2] 1004:9; 1113:3
 cable [119] 920:17, 22, 23, 24, 25;
 921:2, 6; 922:5, 10; 923:6, 22; 934:14;
 936:24; 937:1, 11, 22; 938:19; 939:10,
 13; 941:16, 23; 942:1; 944:18; 947:14,
 15, 16; 949:6; 954:18, 20; 955:2, 5;
 967:18; 968:6; 969:14; 977:23; 978:6,
 20, 24; 979:3,
 4; 980:15, 17, 23; 981:16, 19; 983:10, 15,
 18; 984:2, 16; 985:25; 986:25; 987:5, 18;
 988:6, 22; 989:8; 990:15; 991:2; 992:7;

995:7; 997:8; 998:16; 1000:16; 1001:20,
 25; 1002:4; 1003:22, 25; 1004:4, 16, 20;
 1005:6, 11, 12, 16, 18, 21; 1007:9, 10, 19,
 25; 1008:2,
 16, 17; 1009:3, 13, 14, 22; 1021:12;
 1022:11; 1034:6; 1041:23; 1057:11;
 1059:20; 1065:7; 1066:5; 1074:3, 16, 21,
 25; 1075:2; 1088:16; 1090:14, 23; 1091:8,
 12; 1094:6; 1098:9; 1101:9; 1103:18, 20;
 1111:15, 17, 21
 calculate [2] 946:8; 1110:23
 calculated [3] 914:1; 1065:11; 1107:19
 calculates [1] 1103:17
 calculation [25] 944:1; 977:5; 1027:8;
 1031:5; 1062:22; 1067:9; 1069:9, 11;
 1092:10; 1093:20; 1095:1, 17; 1096:3,
 6; 1099:21; 1102:5, 7, 10, 12; 1103:4,
 16; 1104:2; 1108:1; 1110:14
 calculations [6] 918:1; 1003:3;
 1028:25; 1068:19; 1070:1; 1092:25
 Call [1] 1077:21
 call [27] 919:24; 969:7; 999:13;
 1006:17; 1037:6, 7; 1050:20; 1066:24;
 1073:12, 14; 1075:18; 1077:17, 22;
 1078:14, 20; 1079:1; 1082:2, 3, 6, 19;
 1084:9; 1085:7; 1088:13, 22; 1089:5,
 21; 1091:17
 callbacks [1] 1083:22
 caller [1] 1078:5
 calling [1] 985:25
 calls [2] 1084:10, 11
 CAMPANELLI [12] 1010:10, 14;
 1014:18, 20; 1015:18, 21; 1016:6, 11;
 1021:7, 8; 1023:11; 1024:11
 Campanelli [2] 1010:9, 11
 Campbell [1] 1038:22
 Canadian [25] 928:9; 950:16, 19;
 963:11, 14, 22, 25; 964:2, 6; 974:12, 13,
 14; 975:4; 988:23; 994:18, 21, 24;
 995:1, 6, 8; 1025:7, 14, 16; 1108:9, 10
 Canadians [3] 984:12; 988:21; 1059:24
 capable [1] 1106:21
 capacity [2] 1075:3, 4
 capital [1] 1040:3
 captures [1] 1009:15
 care [7] 913:16; 931:17; 984:9, 10, 11,
 12
 carriage [16] 998:17; 999:10; 1009:18;
 1035:24; 1037:1; 1043:11; 1090:16;
 1095:17; 1097:9, 10; 1099:6; 1100:22,
 23; 1101:19, 21, 22
 carried [38] 937:1, 10; 969:20, 23;
 970:9; 973:22; 976:9; 978:6, 9, 22;
 980:2; 985:5; 990:5, 7, 9; 997:11, 20,
 25; 998:6; 1007:10; 1035:9, 11, 16, 17;
 1036:2, 13; 1049:2; 1055:2, 19;
 1086:18; 1089:19; 1092:16, 21;
 1095:21; 1098:7, 20; 1107:16,
 17
 carriers [1] 983:10
 carries [3] 947:19; 1075:5, 6
 carry [23] 971:7, 8, 14, 19, 25; 972:2;
 974:14; 977:24; 979:12; 990:10; 992:7;
 995:1, 8; 1000:17; 1096:20; 1098:2;
 1099:24; 1101:10, 13; 1103:7, 9;
 1111:18; 1112:1
 carrying [2] 1091:9, 13
 carte [1] 986:7
 case [44] 911:9, 14; 916:22, 25;
 923:23; 950:4; 962:18, 23; 973:3;
 979:22; 983:8, 23; 984:20; 994:10;

996:1; 998:14; 1001:14; 1003:19;
 1004:4, 25; 1008:22; 1019:17; 1022:23;
 1026:5; 1052:14; 1063:22, 25; 1078:8,
 23; 1086:5; 1090:20, 22, 25;
 1091:2, 3, 5; 1095:20; 1098:22; 1099:6;
 1102:12; 1105:1; 1107:13, 23
 cases [9] 911:11; 916:24; 924:8, 10;
 982:1; 1039:20; 1078:8; 1081:3
 categories [41] 920:23; 929:18, 23;
 934:18, 21; 935:1, 4; 936:18; 938:15;
 942:18, 19; 948:4; 950:2, 3, 15, 18;
 951:10; 953:3, 7, 11; 954:15; 960:7;
 966:6; 967:25; 968:2; 974:4; 1006:10,
 23; 1007:14, 15, 18, 21; 1008:1;
 1051:13; 1053:4; 1054:11;
 1058:5, 7, 11; 1059:23; 1078:12
 categorization [1] 948:3
 category [22] 930:5; 934:23; 938:23;
 950:19, 20; 951:23; 955:7, 19, 20;
 957:12; 970:1; 971:10, 16; 974:15;
 989:16; 1003:6; 1009:10; 1014:5, 25;
 1027:11, 21; 1103:1
 caused [1] 1031:3
 caution [1] 935:4
 census [4] 1017:22; 1018:12, 16, 18
 center [1] 1022:4
 central [1] 1021:22
 certainty [1] 1022:22
 chain [1] 1100:18
 Chairman [11] 911:6; 918:14; 930:8;
 996:21, 24; 1060:6; 1065:25; 1066:17;
 1068:1; 1070:24; 1087:8
 CHAIRPERSON [137] 910:3, 13, 20,
 25; 912:10, 13; 913:3, 8, 18, 22; 914:5;
 916:15; 917:2, 15; 918:9; 919:4, 22, 25;
 920:7; 923:17; 928:10, 18, 25; 930:10,
 19; 931:6, 15, 24; 932:18, 22; 933:11,
 14; 938:1, 4, 11, 18, 24; 943:16, 22;
 944:6, 10;
 956:2, 9; 961:2, 7, 13, 17, 23; 962:12, 17;
 963:4, 6; 964:16, 20; 965:1, 5, 8, 12;
 967:3; 968:15, 21; 986:20; 988:14; 993:8,
 13, 16; 994:3, 15, 19; 995:2, 9, 20; 996:2,
 11, 16, 25; 1010:7; 1014:16; 1024:17, 20;
 1025:17, 22; 1037:22, 25; 1038:18;
 1040:2, 18;
 1041:17; 1065:2, 15, 17; 1066:1, 15;
 1067:10, 15; 1068:2, 7, 11, 14, 18, 21;
 1069:5, 15, 21; 1070:5, 10, 16, 21, 25;
 1071:3; 1076:16, 21; 1077:3; 1080:17;
 1081:8; 1087:9, 17, 21; 1088:2, 6;
 1102:22, 25; 1104:11, 22; 1105:7, 12, 21;
 1106:9, 24; 1108:6, 17;
 1109:14, 17, 23; 1112:5, 9; 1114:4
 chance [11] 911:16, 19, 20, 21; 912:25;
 913:10; 1001:3, 6; 1020:1, 11
 change [33] 928:14; 936:14; 937:3, 5,
 14; 942:24; 953:23; 959:6, 8, 10, 12;
 960:8, 11; 961:6; 963:12; 965:6; 982:16,
 18; 1012:21; 1016:8; 1028:19; 1029:16,
 18, 19; 1031:3, 4; 1032:16, 22; 1034:20,
 21, 22; 1111:9, 11
 changed [17] 911:15; 935:5; 943:5, 7;
 962:7; 964:12; 1012:18; 1016:8;
 1030:25; 1031:7, 22, 23; 1032:13, 25;
 1033:1, 6; 1034:11
 changes [25] 921:16; 928:4, 5, 6, 8;
 929:17, 20; 950:8, 9, 13; 953:14;
 954:16; 955:15, 16, 24; 959:16; 962:1,
 2; 963:1, 8; 964:12; 965:15, 19; 966:4
 changing [1] 961:9

channel [9] 947:17, 19; 986:9; 988:8, 11; 989:25; 1052:6, 9; 1075:4
 channels [10] 986:1, 10; 987:19, 23, 24; 988:1; 1075:3, 4, 5; 1111:18
 characteristic [1] 1020:12
 characterization [2] 1017:25; 1087:1
 characterize [1] 986:18
 characterized [2] 1066:3; 1094:21
 charged [1] 1061:10
 charging [2] 986:12, 13
 chart [37] 929:3, 4, 5, 8, 10, 16; 930:3, 9, 11, 13, 14, 23; 931:9; 941:3; 943:10; 956:10, 11, 15; 958:6; 965:24; 967:5; 984:6, 14; 990:18; 996:13; 1003:8; 1013:12, 23; 1021:20; 1023:14, 16, 25; 1025:4; 1026:2; 1057:5; 1060:8; 1068:20
 check [3] 1038:9; 1060:24; 1069:19
 checked [1] 1070:1
 checking [1] 1069:22
 Chicago [4] 1038:6, 14, 19, 20
 chiefly [1] 1038:24
 choice [1] 1051:24
 choices [1] 985:21
 chose [3] 942:11; 1099:23; 1112:1
 chosen [1] 946:13
 chronological [1] 1079:19
 circle [1] 989:7
 circumstances [5] 942:24; 943:6, 7; 1009:15; 1012:19
 cite [1] 971:20
 cited [2] 1035:23; 1105:17
 citing [1] 972:18
 City [3] 1002:1; 1005:12; 1008:18
 city [1] 1075:15
 Claimant [1] 996:13
 Claimants [21] 910:5, 9, 16, 18; 911:13; 919:23; 934:9; 941:8; 969:2; 994:18, 21; 998:15; 1010:11, 17; 1016:10; 1024:14, 18; 1025:1; 1033:25; 1108:9, 10
 claimants [1] 967:7
 claimed [2] 912:22; 918:8
 Claremont [1] 923:14
 clarification [4] 913:24; 918:23; 997:7; 1014:15
 clarify [8] 917:21; 918:14; 946:6; 987:10; 1096:11, 14; 1106:8; 1113:7
 clarifying [1] 1087:15
 classic [1] 914:14
 clear [11] 933:6; 958:17; 959:3; 987:10; 1010:17; 1013:22; 1020:10; 1028:12; 1034:10; 1037:2; 1107:12
 clerk [4] 1038:4, 5, 12, 21
 clerks [1] 1038:7
 climates [1] 950:16
 closer [1] 1028:16
 Co [17] 920:17, 21; 921:23, 24; 922:8, 21, 22, 24; 936:10; 941:18; 945:11; 947:6; 951:3; 952:21; 957:8; 971:18; 972:6
 co-counsel [1] 1016:7
 co-founder [1] 922:6
 Coddington [3] 923:1; 1050:19, 22
 code [1] 1081:6
 colleagues [1] 1106:12
 College [1] 923:14
 college [3] 934:25; 942:17; 1058:9
 Colorado [1] 923:13
 column [41] 934:12, 13, 21; 963:9; 966:24, 25; 974:12; 975:25; 994:23; 995:5; 1017:7; 1058:16, 17; 1062:8, 16; 1065:6, 10; 1067:1, 19, 20, 21; 1068:25; 1069:1, 2, 8; 1070:2; 1078:3, 16; 1080:2, 22, 23; 1083:9; 1088:15; 1093:17; 1100:1; 1104:4; 1105:15
 columns [8] 933:25; 1067:3; 1069:17, 25; 1078:2; 1091:23, 24; 1103:25
 combine [1] 986:13
 combined [1] 1006:13
 combining [2] 1009:23, 24
 comfortable [1] 949:9
 coming [1] 922:12
 comment [1] 995:21
 comments [2] 1036:16, 17
 commercial [3] 1006:10; 1007:13, 15
 commissioned [1] 998:15
 Commissioner [1] 1041:2
 common [2] 979:25; 1068:16
 Commonwealth [1] 1040:21
 companies [2] 1010:19; 1033:23
 Company [8] 920:16; 1010:18; 1031:20; 1033:1, 25; 1034:5; 1075:19; 1085:13
 company [3] 922:14; 1040:21; 1113:2
 comparable [2] 991:23; 1032:19
 compare [6] 948:12; 951:7; 971:12; 1057:14; 1061:1; 1093:23
 compared [7] 912:20; 938:6; 948:16; 982:17; 1022:19; 1063:7; 1067:7
 compares [3] 951:16; 1094:16; 1096:3
 comparing [2] 948:14; 1101:1
 Comparison [1] 1060:8
 comparison [10] 936:17; 942:18; 968:7, 11; 978:18; 1060:1, 5, 25; 1087:19; 1101:15
 competency [3] 1106:11, 17, 18
 competition [3] 922:12, 14; 937:22
 Competitive [1] 922:7
 compiled [1] 1074:14
 complete [4] 939:22; 985:9; 1078:18; 1083:19
 completed [7] 953:4; 1046:4, 6; 1048:1, 2; 1071:23; 1085:13
 completely [1] 958:23
 completion [1] 1083:8
 component [2] 912:16; 1003:2
 composition [2] 940:12; 1027:25
 comprehensible [1] 956:14
 compulsory [3] 1052:1; 1053:7; 1056:14
 compute [1] 1110:6
 computed [1] 1099:19
 computer [1] 1113:2
 conceded [2] 916:7, 8
 concept [1] 921:12
 concerned [4] 928:18; 943:17; 962:6; 982:17
 concerning [6] 910:5; 912:14; 1039:14; 1070:12; 1076:17; 1103:13
 concerns [7] 930:20, 22; 945:7, 10; 1105:22; 1106:14
 conclusion [1] 914:8
 conclusions [1] 967:17
 concur [1] 944:12
 conditions [1] 1064:3
 Conduct [1] 1033:19
 conduct [8] 921:10; 958:1, 4; 985:3; 1002:7, 12; 1033:12; 1034:1
 conducted [7] 934:2; 936:1; 945:13; 952:22; 971:17; 1033:14; 1052:16
 conducting [2] 947:21; 954:6
 conferred [1] 918:10
 Confidence [2] 959:14; 964:4
 confidence [65] 915:22, 24; 917:8; 918:12; 959:6, 9, 11, 17; 960:9; 963:12, 18, 23; 1001:1; 1002:17, 24; 1003:8, 10, 12, 17, 19; 1015:3, 8, 13, 24; 1016:16; 1017:1, 16, 18, 22; 1018:1; 1019:2, 8, 10, 23; 1020:8, 10, 16, 25; 1021:5, 25; 1022:10, 19, 21, 25; 1023:1, 7, 8; 1026:12; 1027:23; 1028:5, 9, 13, 15; 1029:11, 19, 21, 22; 1030:3, 12, 15, 18, 19, 25; 1031:17, 24
 confident [2] 1018:12, 15
 confirm [3] 1013:24; 1016:13; 1088:21
 conform [1] 964:12
 conforms [1] 1025:17
 confuse [1] 961:7
 confused [1] 1047:21
 confusion [7] 945:6; 1036:12; 1042:1, 5, 7, 8, 13
 conjunction [2] 923:9; 980:2
 consecutive [1] 1045:5
 consider [5] 955:21; 971:9; 981:5; 997:16; 1058:6
 considerably [3] 956:25; 1045:22; 1046:2
 considered [4] 952:8; 1100:6, 23, 24
 considering [2] 943:17; 1038:7
 consistency [15] 929:11, 14, 21, 25; 938:9; 959:12; 965:25; 966:2, 12; 968:1; 1023:17; 1024:7, 8; 1057:7, 21
 consistent [37] 929:17, 19, 22; 932:2; 937:15; 938:12; 942:21; 945:25; 946:3; 947:3; 948:4; 951:9, 13, 21, 22, 24; 952:18; 953:6; 957:11; 958:8, 13; 966:6, 10; 967:23; 968:3; 977:19; 978:3; 979:3; 989:14, 18, 21; 1000:5, 8; 1023:19; 1024:8; 1059:16; 1090:13
 consistently [2] 954:9; 981:1
 consolidated [1] 939:11
 constant [10] 915:21; 922:2, 19; 933:20; 934:1, 4; 936:20; 937:7; 967:21; 1041:10
 consulting [1] 922:9
 Consumers [1] 981:8
 consumers [2] 981:5, 13
 contact [12] 939:10, 14; 1042:11, 24; 1044:9, 22; 1073:17; 1078:10, 11; 1079:2; 1084:8, 16
 contacted [5] 1044:2, 4, 5; 1082:8; 1085:2
 contacts [1] 1084:9
 contained [4] 925:19; 926:1, 3; 979:20
 contains [1] 940:24
 contention [1] 912:13
 context [9] 915:15; 966:9; 1053:6; 1056:2, 3, 4, 12, 24; 1100:25
 continue [1] 981:15
 continued [3] 927:16; 945:19; 957:3
 contrast [1] 974:21
 contributed [1] 943:7
 contribution [1] 937:22
 convenience [1] 935:7
 convention [1] 932:17
 copied [3] 957:1; 996:15; 1073:6
 copies [3] 931:4; 972:25; 996:12
 copy [5] 931:12; 961:1; 967:12, 14; 1008:5
 Copyright [7] 941:25; 1043:7; 1046:14;

1047:7; 1048:3; 1085:12; 1112:21
 copyright [3] 977:15; 1057:3; 1094:9
 corner [1] 1110:5
 Corporation [1] 1113:3
 corrected [5] 912:3; 964:22, 24;
 967:12; 1000:24
 correction [7] 927:19; 928:3; 966:22;
 973:19; 1017:12, 13; 1032:5
 correctly [2] 1035:23; 1063:17
 correlate [1] 1103:5
 correspond [4] 1003:7; 1061:21;
 1093:11; 1100:11
 corresponding [1] 929:8
 cost [4] 1099:9, 10, 12, 15
 costs [1] 990:1
 Counsel [3] 930:10; 956:9; 968:15
 counsel [15] 910:16; 956:20, 22; 957:1;
 964:9; 968:16; 995:12, 18; 996:14, 17;
 1006:2; 1010:11; 1041:11; 1076:22;
 1114:2
 count [2] 1083:6; 1101:5
 counted [1] 1083:23
 country [2] 982:2, 10
 couple [5] 950:12; 997:6; 1064:17;
 1091:21; 1113:6
 course [8] 924:3, 24; 925:2; 955:6;
 968:3; 1038:25; 1082:1; 1099:20
 cover [1] 1081:20
 coverage [1] 983:6
 covered [1] 919:17
 covering [1] 982:1
 create [2] 1052:6; 1054:6
 criticism [10] 925:11; 972:18, 19, 21;
 998:7; 999:9; 1012:6; 1049:24; 1050:15;
 1087:2
 Criticisms [1] 1035:4
 criticisms [18] 925:19, 24, 25; 926:2, 7,
 10, 12; 944:25; 945:3, 4; 952:4, 5, 8;
 955:25; 998:4; 1048:25; 1049:23;
 1050:5
 CROSS [6] 968:22; 1041:20; 1088:7;
 1106:25; 1108:21; 1110:2
 cross [16] 911:20, 21, 22, 23; 914:15;
 915:11; 917:17, 18; 918:19, 24; 929:24;
 932:19, 20; 943:11; 961:6; 1105:19
 CROSS-EXAMINATION [3] 997:4;
 1010:13; 1025:24
 CRT [1] 923:22
 cum [1] 946:17
 curve [4] 1019:7, 10, 12; 1028:18
 customer [3] 981:2; 1005:1, 2
 cut [2] 918:2; 922:15

D

Data [1] 1113:3
 data [34] 910:12; 913:14, 15; 915:2;
 928:13; 940:16, 19; 962:9; 973:20;
 983:1; 989:3; 990:4; 994:12; 995:15;
 1008:9; 1023:13, 18; 1024:9; 1026:20;
 1031:4, 5, 6, 7; 1032:17, 19; 1036:7;
 1042:3; 1043:11; 1045:4; 1046:9;
 1103:10, 13; 1113:4,
 25
 database [4] 995:16; 1112:22, 24;
 1113:11
 date [5] 1074:2; 1078:9; 1080:13, 23
 dates [1] 1045:18
 day [10] 910:3; 922:23; 927:10;
 1039:18; 1041:3; 1058:11; 1081:17;
 1112:15
 days [1] 1113:6

deal [2] 930:17; 1039:20
 December [3] 998:20; 1046:6; 1113:1
 deciding [1] 1098:2
 decision [13] 911:12; 916:21; 921:19;
 942:6; 945:15; 955:14; 956:1; 972:12;
 1041:12; 1094:6; 1099:6; 1100:22, 23
 decisions [4] 942:9; 955:23; 1084:21;
 1085:5
 decline [3] 949:24; 1000:7; 1100:17
 declines [1] 1096:1
 declining [4] 958:12; 1003:13; 1096:19;
 1097:20
 defer [1] 1028:10
 deficiency [1] 970:14
 defined [2] 982:11; 1094:8
 definition [3] 1028:8; 1029:20; 1089:19
 definitions [2] 955:19, 20
 degree [4] 923:14; 966:20; 1021:4;
 1022:22
 delete [1] 1000:2
 demands [1] 1005:6
 denied [1] 919:5
 Denver [1] 988:15
 department [1] 934:7
 depending [3] 1061:12; 1092:15;
 1099:13
 derive [1] 913:1
 derived [1] 1067:2
 describe [6] 973:14; 976:9; 998:3;
 1019:24; 1073:23; 1074:18
 described [2] 912:5; 1001:21
 describing [1] 914:1
 description [1] 1030:6
 designate [1] 1097:4
 designated [1] 1097:24
 designation [3] 932:17; 1080:15;
 1097:16
 designations [1] 1097:3
 designed [7] 941:22; 985:5; 999:9;
 1001:2, 16; 1034:2; 1035:15
 desk [1] 919:22
 despite [1] 917:24
 detail [1] 946:18
 details [1] 1066:11
 determination [4] 942:23; 945:5;
 952:23; 1083:2
 determinations [3] 923:10; 924:15;
 926:1
 determine [17] 925:10, 18; 946:13, 21;
 994:24; 1005:2; 1030:15, 18, 19;
 1051:5, 6, 8; 1060:3; 1095:2; 1098:9;
 1102:16, 17
 determined [4] 946:16; 957:17; 1058:1;
 1079:24
 determines [2] 1030:2, 11
 develop [1] 1002:9
 deviation [3] 1002:23; 1003:2, 5
 Devotional [7] 928:8; 1010:11, 17;
 1016:9; 1024:14, 18, 25
 devotional [29] 950:6, 16, 20; 960:6;
 963:11, 14, 21, 25; 964:2, 5; 967:7;
 974:12; 975:3; 984:12; 988:23; 1006:13;
 1009:4; 1011:11, 14, 19; 1012:22;
 1013:25; 1014:5, 24; 1015:7, 20;
 1016:23; 1023:13, 24
 devotionals [4] 966:24; 988:21; 1012:2;
 1021:18
 diaries [3] 1069:20, 23; 1070:8
 difference [9] 912:21; 917:7; 935:11;
 938:12; 939:1; 944:7; 971:16; 979:3;
 1105:16

differences [7] 940:2; 943:19; 944:4;
 983:20; 1009:14, 17; 1092:13
 differently [7] 914:21; 933:3; 939:5;
 1018:15; 1041:9, 11; 1051:23
 differs [1] 1005:7
 difficult [2] 956:23; 1082:23
 difficulty [2] 956:11; 1082:22
 DIRE [1] 923:19
 dire [1] 923:16
 DIRECT [3] 920:9; 927:16; 957:3
 direct [15] 911:9, 13; 920:15, 16;
 922:13; 932:25; 960:14; 973:3; 983:7,
 23; 996:1; 1013:9; 1035:24; 1052:20;
 1084:8
 directed [3] 984:16; 1112:21; 1113:24
 Directing [1] 950:7
 director [1] 922:6
 disagree [1] 1094:23
 disagreement [1] 993:9
 DISC [1] 1078:15
 disclosed [1] 962:9
 disconnected [1] 1078:15
 discover [1] 1036:5
 discovered [2] 1037:10; 1042:2
 discuss [3] 927:3, 5; 973:5
 discussed [10] 946:12; 949:1; 973:25;
 994:8; 1001:19; 1003:21; 1062:14;
 1064:2; 1067:23; 1068:13
 discussing [7] 956:10; 960:14; 969:3;
 1000:23; 1012:18, 19; 1107:8
 discussion [11] 910:5, 15; 912:17;
 952:4; 980:13; 981:15; 989:8, 10;
 1004:19; 1007:24; 1063:17
 dispensation [1] 1087:15
 disposition [1] 1078:13
 dispute [1] 1069:15
 disqualifier [1] 1078:17
 dissent [1] 1077:4
 Distant [1] 1110:20
 distant [78] 936:21; 937:6, 9; 943:1;
 967:24; 970:10; 978:9, 21; 979:13;
 980:1, 2, 8, 16; 981:22; 983:9, 11, 13,
 16, 18; 984:20; 985:6; 989:9; 990:5, 7,
 10, 11; 997:9, 25; 1000:2, 17; 1005:10;
 1007:11, 12; 1008:20; 1009:6; 1035:9,
 11; 1036:3,
 13, 25; 1041:23; 1049:9, 19; 1051:16, 22;
 1052:6; 1055:3, 19, 22, 24; 1056:13, 16,
 24; 1064:11; 1086:3; 1090:16; 1091:25;
 1092:2, 5, 21; 1093:4, 6; 1095:22; 1096:3,
 4; 1098:20; 1099:3, 23; 1101:2, 3, 12, 22;
 1103:8; 1107:17; 1110:23; 1111:18, 25
 distinction [2] 937:24; 939:4
 distinctions [1] 935:10
 distinctive [1] 1079:11
 distinguish [2] 938:20; 995:5
 distinguishable [1] 938:2
 distinguished [2] 937:9, 13
 distribute [1] 910:14
 distributed [3] 919:19; 996:14, 16
 distribution [9] 943:2; 977:20; 997:23,
 24; 998:10; 999:6; 1003:11; 1012:15;
 1019:5
 distributors [1] 1057:4
 diversity [2] 987:1, 2
 divide [2] 975:25; 1095:7
 divided [4] 1062:25; 1067:24; 1068:6,
 15
 dividing [2] 1065:9; 1068:24
 division [2] 1067:3, 21
 document [24] 911:7, 23; 932:12;

969:4; 973:3, 7, 10; 998:5; 1016:8;
1024:16, 24; 1060:16; 1071:11, 22;
1076:13; 1106:8, 11, 17; 1108:14, 18;
1109:20, 22, 24
documents [5] 924:4; 925:22; 1050:1,
17; 1077:8
doesn't [15] 912:4; 914:24; 932:8;
981:25; 984:9, 10, 11; 988:9; 995:4;
1027:14; 1029:11; 1058:22; 1073:7;
1105:2
dollar [12] 934:18; 1053:9, 15, 23;
1054:1, 2, 5; 1055:7, 12, 20, 21
dollars [2] 944:11; 1102:3
dose [1] 1002:20
double [1] 1038:11
downward [1] 1058:20
dozen [1] 1038:12
Dr [2] 946:25; 1028:10
dramatically [1] 1064:9
draw [4] 914:8, 18; 1005:24; 1094:4
drawing [1] 1006:1
drawn [8] 951:4; 952:12; 967:18;
1028:15; 1031:13; 1032:5, 9; 1042:17
drew [2] 914:20; 1028:13
drop [1] 1107:13
dropped [1] 1086:19
dropping [1] 1065:8
DSE [28] 1061:6, 10, 17; 1062:19, 20;
1065:6, 9, 10; 1066:8; 1067:1, 22;
1093:17; 1096:18, 19; 1097:1, 14, 15,
18; 1098:23; 1099:16; 1100:3, 10;
1101:6; 1111:4, 6, 8, 12
DSEs [14] 1069:8, 17; 1095:2, 16;
1096:20; 1100:1; 1103:25; 1104:5;
1105:4, 15; 1107:18; 1111:2, 5
due [2] 1047:2, 12
duly [1] 920:5
duplication [1] 983:22

E

ease [3] 931:10, 14; 993:6
easel [2] 930:16, 24
easier [1] 931:18
easiest [1] 973:23
economic [1] 920:19
economics [1] 923:14
Edison [1] 1040:21
educational [3] 923:11; 1007:5, 12
effect [5] 918:3; 999:23; 1000:1;
1006:7; 1100:1
effectively [1] 921:18
effort [2] 914:19; 1001:23
efforts [1] 1086:4
eight [3] 987:23; 988:3; 1064:18
elect [1] 971:25
element [1] 929:21
elements [1] 929:13
elicit [1] 1104:19
ELRA [22] 941:4, 5, 11, 14, 23; 942:10;
943:23; 944:14; 948:1, 8, 15; 950:17;
958:18, 20; 966:25; 967:9; 1011:4, 20;
1014:6; 1024:1, 3
em [1] 1073:6
emergence [1] 942:25
emphasize [2] 1013:21; 1017:2
employed [1] 952:25
end [4] 1018:5; 1020:23; 1047:16;
1083:21
enhance [1] 988:22
enhances [1] 984:3
enlist [1] 995:17

enter [1] 1072:3
entering [1] 1036:7
enters [1] 1003:2
entitled [1] 1060:8
entries [3] 969:9; 1081:1; 1088:10
entry [3] 966:23; 974:1
equal [2] 1027:10; 1107:17
equate [3] 1062:21; 1100:8; 1105:3
equated [1] 1100:2
equivalent [4] 1096:4, 5; 1107:19;
1108:2
erase [1] 993:11
error [7] 912:16, 18; 1000:22; 1003:16;
1025:6; 1042:3; 1106:16
essence [2] 943:8; 1099:7
essentially [13] 934:9; 936:18, 25;
948:15; 950:4; 951:2; 952:2; 953:22;
957:9; 971:5; 1046:12; 1078:3; 1094:8
established [1] 1069:3
estimate [5] 1003:11; 1016:22; 1017:4,
6; 1020:14
estimates [1] 913:7
estimating [1] 1111:24
estimation [3] 933:15; 1003:4; 1109:7
etc [1] 928:6
etcetera [2] 1075:6; 1078:16
evaluating [1] 1023:16
eventual [1] 977:17
Everybody [2] 933:17; 1077:4
everybody [3] 931:18; 933:14; 988:14
evidence [13] 910:17; 919:18; 928:21;
932:17; 983:14, 17; 996:8; 1023:17, 19;
1076:11; 1077:6, 11; 1105:10
evidenced [1] 929:18
evident [2] 942:22; 955:25
ex-clerks [1] 1039:2
exact [2] 1092:24; 1110:16
Exactly [1] 919:3
exactly [9] 986:18; 1027:24; 1032:16;
1055:25; 1057:10; 1067:4, 7; 1093:11;
1113:7
EXAMINATION [9] 920:9; 927:16;
957:3; 968:22; 1041:20; 1088:7;
1106:25; 1108:21; 1110:2
examination [15] 914:15; 932:19;
933:10; 973:5; 994:8, 13; 995:13, 18;
1037:23; 1070:12, 13, 15; 1087:14, 24,
25
examine [4] 994:23; 995:24; 1076:23;
1105:20
examined [1] 920:5
example [32] 925:14, 22; 944:14;
947:12; 948:7; 949:13; 953:15; 954:19,
23; 974:22; 976:18; 977:13; 979:10, 12,
24; 981:16; 997:18; 998:21; 1005:15;
1027:8; 1030:9, 24; 1061:3, 16; 1065:8;
1067:22; 1068:10; 1078:14; 1090:5;
1092:4; 1100:22;
1108:3
examples [2] 920:20; 1090:12
except [7] 912:5; 930:15; 984:3;
988:23; 997:12; 998:18; 1059:24
excess [1] 921:6
exciting [1] 1081:13
exclude [1] 1108:24
exclusivity [3] 999:16, 19; 1000:2
Excuse [9] 959:20; 975:10; 1002:22;
1031:16; 1046:19; 1056:15; 1076:21;
1084:6; 1102:22
excuse [4] 943:19; 1024:13; 1049:18;
1108:12

excused [3] 919:7; 1112:7, 8
executed [7] 926:20; 934:6; 950:25;
952:21; 1034:3; 1072:2; 1075:20
execution [2] 952:15; 1036:22
executives [4] 921:11; 934:11; 969:15;
1075:11
exercise [1] 992:18
exhaustive [1] 926:6
Exhibit [48] 910:5, 9, 18; 915:17, 25;
930:12; 932:10, 13; 933:16; 935:9;
966:23; 967:2; 969:3, 7; 973:1, 4, 11;
978:3; 990:15; 994:7; 996:7, 13; 997:17;
999:15; 1008:4; 1013:2, 4; 1016:10;
1024:14; 1025:1, 4, 16; 1058:12, 14;
1060:7, 17;
1064:24; 1067:5; 1071:7, 12; 1073:4, 24;
1076:5, 14; 1077:18; 1078:25; 1087:12;
1109:15
exhibit [41] 910:7; 912:12; 928:11, 20,
24; 933:1, 20; 973:5; 994:10, 14, 22;
995:4, 14, 15; 996:3; 997:8, 18;
1008:10; 1010:16; 1011:6; 1059:8;
1060:7, 11; 1065:1, 12; 1066:4;
1068:24; 1076:23; 1087:16, 25;
1091:22, 23; 1102:1; 1103:13, 22;
1104:16, 18; 1105:6, 9; 1109:11; 1110:19
Exhibit14-X [2] 1072:6; 1075:14
ExhibitProgram [1] 1088:12
Exhibits [3] 1076:17; 1077:5, 9
exhibits [2] 932:21; 962:23
exist [1] 1002:3
existing [1] 921:3
expanded [1] 986:13
expansion [1] 955:20
expect [12] 948:1; 971:5, 15; 979:4;
980:14; 989:14; 1001:3; 1005:14;
1009:16; 1020:11; 1028:1; 1064:14
expected [1] 968:4
expensive [2] 1101:9, 14
experience [10] 929:17; 937:15; 966:7,
13; 968:4; 977:23; 981:13, 19; 985:2;
1005:19
experienced [2] 951:17, 18
experimented [1] 986:7
expert [1] 1030:4
explain [16] 915:25; 929:4; 933:20;
953:20; 974:1, 5, 23; 975:22; 1000:24;
1002:23; 1061:25; 1065:5, 11; 1069:14;
1090:11, 13
explainable [1] 1091:16
explained [3] 1065:13; 1067:8; 1102:14
explanation [4] 912:23; 953:14;
1067:19; 1068:23
explore [2] 912:22; 995:12
express [1] 1036:12
expressed [4] 1018:22; 1042:1, 4, 7
expressing [1] 1003:12
expression [1] 1003:16
extending [1] 929:25
extent [2] 984:19; 1007:17
extremely [1] 989:2
eye [1] 917:6

F

F-O-R-D-E [1] 1038:19
face [1] 1093:1
faced [1] 1053:2
Fact [3] 1074:13, 14; 1084:14
fact [26] 938:25; 943:3; 947:11; 954:5;
970:25; 974:14; 977:24; 984:3; 995:7;
997:23; 999:3; 1003:21; 1011:13;

1026:15; 1034:4; 1059:17; 1064:16;
1066:6; 1069:16; 1074:19, 22; 1093:19;
1095:7; 1105:13; 1107:25; 1113:16
factor [7] 946:8, 12, 13; 976:16, 22;
986:25; 1109:6
factoring [1] 976:12
facts [2] 995:17; 1104:16
failed [1] 911:24
fails [1] 910:6
fair [3] 925:5; 957:2; 990:3
fairly [1] 949:10
fairness [3] 911:6; 930:20; 956:19
fall [17] 977:16; 979:16; 1001:5, 7;
1017:2, 23; 1018:13, 18; 1019:11;
1020:2; 1022:12, 24, 25; 1023:2, 10;
1027:5; 1028:7
falls [1] 1019:15
familiar [18] 954:24; 982:24; 994:12;
997:22; 999:15; 1004:21, 24, 25;
1013:1; 1039:1; 1062:5; 1077:23;
1080:15; 1090:21; 1097:2; 1106:4;
1107:5; 1110:15
familiarity [1] 927:3
famous [1] 1062:13
FARMAKIDES [24] 917:16, 21; 933:2;
946:6, 19, 24; 947:2, 7; 983:25; 984:8;
986:23; 987:8; 988:19; 996:19; 1081:16,
22; 1082:4; 1094:14, 22; 1095:3;
1096:7, 11, 15; 1106:6
Farmakides [2] 1004:22; 1040:6
fashion [2] 911:3; 957:17
favorable [1] 914:22
favorite [1] 978:12
feasibility [1] 920:19
feature [1] 1086:3
February [2] 1048:4; 1074:15
federal [1] 1038:21
fee [7] 986:10, 12, 13, 14; 1100:10;
1110:7, 23
feel [1] 933:2
fees [2] 1047:12; 1057:3
fell [3] 976:15; 1026:9, 17
fellow [2] 1006:2; 1040:16
felt [4] 937:8; 942:7; 945:22; 1012:12
fifth [7] 1069:2; 1080:20, 21; 1098:2,
12; 1111:6
figure [12] 940:11; 972:5; 976:1; 991:7,
14; 1019:2; 1021:19; 1031:8; 1032:23,
25; 1095:2
figures [12] 915:12, 18; 928:22; 944:14;
953:14; 961:9; 974:3; 975:11, 14; 978:2;
1022:17; 1100:11
file [2] 1113:15, 24
filed [4] 911:9; 924:7; 926:15; 1114:1
filing [1] 1047:16
fill [3] 989:25; 991:1; 1074:12
filled [9] 1067:14, 17; 1074:11;
1075:12, 16, 21, 23; 1084:2; 1085:7
final [4] 917:4; 952:22; 1078:16; 1086:8
find [18] 925:15; 965:25; 966:2, 5;
968:5; 971:15; 980:7; 981:3, 21; 988:7,
10; 1026:18; 1039:11, 22, 23; 1094:1;
1095:23; 1104:14
findings [4] 929:16; 944:20; 951:10;
1042:21
fine [2] 931:20; 1070:11
finger [1] 1013:3
fingers [1] 1014:22
finish [2] 977:11; 1084:6
firm [8] 922:9; 927:12; 934:7; 945:12;
1038:25; 1039:17; 1041:2, 7

First [8] 911:6; 913:23; 914:5; 916:17;
976:13; 997:6; 1031:13; 1111:4
first [68] 914:13; 915:7; 916:6; 920:4;
922:4; 929:15; 932:24; 933:22; 934:21;
942:19; 955:13; 959:23; 968:17, 20;
970:2; 973:25; 983:11, 12; 991:24;
998:19; 1010:16; 1011:10, 18; 1012:1;
1045:15; 1046:24; 1047:4, 6; 1048:4,
12, 24; 1049:17;
1050:20; 1067:3, 23; 1068:13, 25;
1069:25; 1072:6, 9; 1073:3, 19, 24;
1075:17; 1077:17; 1078:4; 1079:2, 7, 16,
18; 1080:22; 1083:7; 1084:16; 1088:11;
1091:23, 24; 1096:18; 1097:1, 5, 14, 18,
25; 1099:3; 1107:3, 16; 1111:8
fit [3] 915:19; 962:24; 1099:13
fits [1] 1103:1
Five [1] 1023:3
five [16] 911:22; 938:13; 939:1; 940:3;
950:18; 985:19; 987:22; 988:3; 1019:25;
1020:4; 1027:1; 1064:1; 1086:24;
1087:3; 1090:8, 15
fixed [14] 1007:20; 1053:9, 15, 22;
1054:1, 2, 4, 18, 20; 1055:7, 12;
1099:16, 17
flagship [1] 1102:19
flip-flop [2] 943:7, 9
flipping [1] 1045:6
fluctuations [1] 954:3
focus [5] 969:9; 973:24; 988:20; 992:6;
1088:10
focused [1] 1090:12
focusing [2] 990:2, 14
followed [3] 935:1; 950:3, 5
Following [1] 1021:10
following [5] 928:1; 945:12; 1047:13,
16; 1111:1
follows [1] 920:6
followup [1] 1069:9
forcing [1] 1045:5
Forde [4] 1038:14, 18; 1040:17; 1041:6
foregoing [1] 1041:14
Form [7] 941:23; 1000:16; 1001:20;
1002:4; 1009:22; 1098:19; 1109:24
form [11] 943:1; 961:8, 20; 964:22;
965:5; 993:6; 996:14; 1073:12; 1077:23;
1102:25; 1109:25
Form3 [1] 1110:1
formal [1] 972:15
format [1] 1067:5
former [3] 1038:6, 19; 1039:21
formerly [1] 1016:7
formula [7] 912:6, 25; 913:1, 6, 12;
946:20; 1068:5
formulas [1] 918:2
forth [3] 927:1; 929:7; 1045:6
forward [5] 936:5; 970:7, 20; 972:23;
998:11
found [3] 945:24; 957:11; 986:11
four [29] 910:3; 912:5, 10; 913:4, 17;
916:18; 917:12; 933:25; 934:20; 938:5,
11, 25; 940:2, 12; 959:23; 961:10;
962:20; 963:8; 964:11; 973:17; 974:9;
976:24; 977:3; 980:3; 991:6; 992:3;
1080:9; 1093:2; 1098:3
fourth [12] 1061:19; 1062:10; 1068:12;
1069:1; 1080:20; 1088:11; 1092:4;
1096:17; 1098:1, 22; 1111:5, 12
frame [1] 1044:18
franchise [1] 1005:3
free [6] 1004:6, 15; 1038:1; 1051:9, 25;

1053:11
friend [1] 1079:7
frustrating [1] 1104:15
frustration [1] 1104:25
full [2] 920:11; 1048:25
fully [4] 937:9, 13; 979:3; 1090:17
fund [1] 1109:4
funds [2] 1040:22; 1100:11
future [2] 921:5, 18

G

gap [5] 953:10; 954:9, 11, 12; 957:14
GARRETT [3] 1038:16; 1112:15, 19
Garrett [1] 1112:14
gather [2] 1040:8; 1106:12
gathering [1] 1010:25
gave [11] 977:24; 978:7; 990:15; 991:3,
17, 20, 24; 992:2, 14; 1017:13; 1027:13
generate [1] 947:16
GERSCH [7] 910:10, 19, 22; 913:23;
914:10; 918:13, 25
Gersch [4] 913:21, 22; 917:24; 918:8
gets [5] 981:12; 1059:21; 1074:8;
1075:17; 1112:14
Give [1] 920:20
give [11] 972:25; 990:20, 23; 1016:6;
1017:17, 18; 1029:12; 1038:8; 1055:11;
1071:8; 1113:19
given [19] 912:12; 930:5; 931:5;
937:16; 940:1; 945:4; 955:25; 969:19,
22; 976:22, 25; 979:5; 981:4; 985:11,
15; 1036:20; 1041:23; 1089:18; 1113:16
gives [2] 1008:24; 1068:17
giving [2] 955:20; 981:24
goal [7] 1021:3; 1052:11, 24; 1053:1, 6,
8; 1054:3
goes [7] 977:5; 988:15; 1009:10;
1058:17; 1066:9; 1092:6; 1099:21
GOTTFRIED [1] 1040:1
graph [5] 933:24; 935:8, 12, 16; 943:10
graphical [6] 929:5; 930:12; 931:10, 25;
932:5; 933:15
great [2] 937:21; 1039:19
greater [5] 1018:22; 1019:1; 1029:24;
1059:5; 1093:20
greatest [2] 1019:21; 1022:22
gross [6] 1092:15; 1095:25; 1096:1;
1111:4, 6, 7
ground [1] 1066:3
grounds [3] 911:24; 912:8; 1066:13
Group [1] 922:7
group [14] 933:22; 940:24; 942:10;
944:18; 950:22; 971:6, 18; 977:2; 988:4;
989:24; 1009:5; 1039:21; 1072:20;
1101:2
growing [1] 1034:12
grown [1] 983:4
guess [11] 913:16; 969:4; 985:25;
990:22; 1044:3; 1052:12; 1053:16;
1055:9; 1071:3; 1080:11; 1083:6

H

half [7] 939:22; 979:21; 1018:7;
1046:24; 1047:1, 11; 1086:18
Hand [1] 956:20
hand [2] 920:1; 972:25
handle [1] 932:3
hanky [1] 914:19
happens [3] 930:15; 985:1; 1084:24
happy [7] 931:12; 933:8; 1060:25;

hasn't [1] 930:16
 haven't [8] 919:19; 990:7, 11; 1026:20,
 25; 1028:25; 1030:5; 1097:16
 HBO [2] 937:14, 16
 head [1] 915:11
 headed [1] 1039:21
 heading [2] 1094:18; 1110:20
 hear [1] 1065:18
 heard [1] 1096:8
 Hearing [1] 961:18
 hearing [2] 983:9; 1067:19
 hears [1] 1085:21
 heavily [1] 979:6
 heck [1] 956:21
 held [1] 1054:11
 help [2] 953:20; 991:1
 helpful [4] 931:13; 933:16; 1045:2, 7
 helping [2] 922:11; 1054:6
 HESTER [26] 932:15, 20; 968:19, 23;
 971:23; 974:20; 975:13; 978:12, 15;
 983:7; 989:6; 993:5, 12, 15; 994:5;
 995:11; 1025:10; 1040:14; 1065:19;
 1087:11, 18, 22; 1088:5, 8; 1089:16;
 1091:19
 Hester [8] 969:1; 1008:4; 1009:11;
 1062:14; 1063:17; 1064:3; 1065:20;
 1088:9
 heyday [1] 937:17
 Hi [1] 1010:10
 high [24] 937:25; 954:25; 966:20;
 971:20; 972:1; 977:25; 978:7; 980:18;
 981:4, 24; 984:24; 989:2, 17; 990:6, 9;
 1016:24; 1018:5; 1021:4; 1022:8;
 1027:13; 1064:13, 21; 1083:21; 1091:6
 higher [13] 938:17; 942:16; 948:19;
 950:2; 951:18; 971:1; 981:12; 1021:1;
 1027:18, 20; 1029:2; 1097:18; 1107:7
 highest [6] 957:12; 967:23; 1017:3, 6;
 1021:22; 1027:10
 highly [4] 979:10; 981:19; 1051:21;
 1059:16
 history [4] 923:22; 927:1; 929:15;
 967:21
 home [1] 984:2
 Honor [40] 918:13; 928:12, 24; 930:11;
 931:9; 933:8, 13; 935:18; 957:4; 960:18;
 961:5, 12, 16, 22; 962:8, 25; 964:14, 19,
 25; 965:7; 967:15; 968:19; 978:13;
 983:7; 993:5; 996:10; 1014:19; 1040:15;
 1064:25; 1065:19; 1069:8, 20, 25;
 1070:7;
 1077:2; 1087:11; 1088:4; 1108:11, 20;
 1112:20
 hopefully [1] 1087:13
 hour [1] 993:17
 hours [1] 954:22
 house [1] 1039:2
 households [1] 982:2
 housekeeping [4] 996:9; 1025:2;
 1038:2; 1112:10
 hundredth [2] 944:15, 17
 hurried [1] 911:2
 husband [3] 1038:23; 1041:1, 7
 hypothetical [2] 980:15; 1051:18

**l'd [21] 910:13, 14; 911:2; 914:12;
962:13; 969:4; 1005:24; 1015:11;
1016:12; 1018:14; 1037:20; 1038:4;
1048:20; 1060:6, 24; 1066:18; 1071:6;**

1076:4, 9; 1096:13; 1104:19
I've [6] 921:24; 923:8; 1010:12; 1025:5;
1055:17; 1090:12
idea [2] 1054:7; 1106:3
identical [3] 952:24; 955:12; 1086:12
identification [11] 931:16, 22; 932:14;
973:12; 976:14; 996:6; 1024:25;
1060:18; 1071:13; 1076:15; 1077:10
identified [7] 1026:21; 1034:6; 1037:14;
1050:1; 1066:23; 1081:18; 1103:12
identity [4] 970:13; 1005:25; 1055:15;
1066:25
identity [1] 1044:14
ii [2] 912:3; 913:4
illustrate [3] 938:9; 967:5; 1093:2
illustrates [1] 966:20
illustration [1] 1005:24
illustrative [1] 979:11
illustratively [1] 979:25
imagine [2] 944:11; 1005:20
immediately [3] 963:8; 1042:20;
1047:16
impact [1] 955:7
import [5] 979:17; 981:22; 1066:14;
1093:6; 1094:7
important [8] 933:6; 950:13; 951:25;
952:10; 981:5; 987:17; 988:5; 1009:7
imported [5] 980:9; 984:7; 985:1;
1091:3; 1100:10
importing [2] 1091:25; 1092:1
imports [1] 993:18
improvements [2] 1012:12, 14
inaccurate [1] 1087:3
Inc [1] 920:16
include [5] 918:15; 1012:3; 1019:7;
1074:24; 1075:20
included [27] 919:13; 934:4, 10, 19, 22;
941:14, 19; 950:18, 20; 955:17; 960:13;
967:8, 9; 973:3; 992:8; 1006:10;
1011:12, 19; 1012:2, 7; 1014:5;
1032:20; 1037:16; 1042:18; 1044:1;
1050:24; 1051:3
includes [2] 1001:25; 1075:7
inclusion [1] 953:2
inconsistent [1] 1090:19
incorrectly [1] 1037:6
increase [3] 968:5, 11; 1029:6
increased [8] 936:18; 943:3; 948:16;
950:1; 954:17; 957:13; 982:23; 1012:14
increases [1] 1104:3
increasing [1] 955:4
independent [6] 958:23; 1006:4, 9;
1007:10, 15; 1049:21
index [9] 1063:6, 7, 9; 1067:8, 19, 20,
25; 1068:17; 1095:7
indexed [1] 1093:19
indexes [1] 1093:11
indicate [9] 999:4; 1001:2; 1046:16;
1078:15, 16, 17, 18; 1086:21, 23
indicated [2] 913:9; 1049:1
indicates [1] 1078:14
indication [8] 913:11; 944:21; 1025:15;
1036:23; 1042:7; 1056:7; 1063:14;
1092:18
indicator [1] 1063:11
individual [33] 915:4; 925:21; 934:14;
938:20; 940:23; 955:23; 974:8; 977:6;
979:8; 984:18; 985:9, 10; 986:16;
987:14, 20; 1004:21, 25; 1019:19;
1020:22; 1032:20; 1033:7, 8; 1038:15;
1051:13; 1057:7, 8, 9; 1066:19, 21;

1073:17; 1084:15; 1085:3;
1086:17
individually [1] 938:21
individuals [3] 987:24; 1057:11;
1072:21
indulgence [1] 933:9
industry [10] 920:24; 939:11; 942:22;
953:19; 954:17; 958:9, 14; 986:11;
1040:8, 12
inferences [2] 1094:4
inferentially [1] 1039:9
information [38] 911:8; 933:18; 960:15;
969:22; 979:8; 1002:14; 1010:25;
1032:10, 13, 14; 1035:25; 1036:25;
1041:24; 1045:14; 1048:8, 11, 14;
1065:23; 1066:8; 1069:16, 17; 1074:14,
16; 1075:2, 7, 10, 12, 21; 1085:10, 11;
1090:18; 1095:10,
16, 18; 1097:11; 1104:19, 20; 1105:5
informed [1] 1042:12
initial [2] 922:22; 936:20
initials [1] 1078:7
inquire [1] 1088:6
insert [1] 960:19
inside [2] 915:4; 916:2
instance [11] 934:15; 949:5; 979:15,
19; 980:3; 1021:18; 1028:4; 1064:5, 6;
1074:23; 1085:1
instances [12] 942:5; 971:4, 14; 978:6;
980:8; 983:15; 987:19; 1037:10; 1057:4;
1078:6; 1080:22; 1095:22
instruct [3] 997:15; 1054:4; 1082:20
instructed [3] 1082:17, 25; 1084:17
instruction [1] 1083:2
instructions [1] 1036:20
instrument [1] 1062:1
intelligent [1] 1040:11
intended [6] 926:8; 946:15; 987:15;
1002:13; 1054:20; 1109:5
interchangeably [1] 1023:7
interest [4] 984:21; 988:9; 1005:2, 4
interested [2] 947:13; 969:6
interesting [1] 981:11
International [1] 988:15
interpret [1] 1104:4
interpretation [2] 1104:7, 16
interrupt [1] 1021:6
interval [30] 959:17; 963:12; 964:4;
1001:1; 1002:25; 1003:8, 10, 12, 17, 19;
1015:4, 8, 24; 1016:16; 1017:19;
1020:8, 10, 16; 1022:1, 19; 1023:9;
1026:12; 1027:23; 1028:9, 13, 15;
1029:12, 19, 21; 1030:3
intervals [20] 915:22, 24; 917:9; 959:6,
10, 11, 14; 960:9; 963:18, 23; 1015:13;
1017:16; 1020:25; 1030:12, 15, 18, 20,
25; 1031:17, 24
interview [4] 942:11; 1061:23; 1083:18;
1085:8
interviewed [2] 939:19; 1072:23
interviewer [13] 1072:11, 14; 1073:20;
1074:8, 9; 1075:17; 1078:6; 1079:8, 9;
1083:3; 1084:11; 1085:3, 21
interviewers [5] 1072:16, 17, 25;
1078:7; 1082:17
interviewing [2] 1072:22; 1077:14
Interviews [1] 953:4
interviews [2] 921:10; 1036:9
introduce [4] 1060:7; 1071:7; 1076:4, 9
introduced [1] 1088:1
introduction [4] 928:1; 1024:14;

1068:23; 1087:12
 INV [1] 1078:5
 involved [7] 925:4; 936:11; 939:8;
 1036:22; 1066:12; 1081:19; 1092:25
 involvement [5] 922:1, 19; 924:12;
 927:8, 12
 involves [1] 916:18
 involving [1] 916:18
 Island [2] 1089:8, 12
 issue [6] 970:20; 1006:18; 1038:24;
 1053:4; 1098:1; 1113:20
 issues [4] 915:22; 927:3; 952:13;
 1113:22

J

JAMES [1] 920:3
 James [2] 919:24; 920:13
 January [2] 1074:2; 1079:23
 January5 [1] 1079:3
 JIGANTI [137] 910:3, 13, 20, 25;
 912:10, 13; 913:3, 8, 18, 22; 914:5;
 916:15; 917:2, 15; 918:9; 919:4, 22, 25;
 920:7; 923:17; 928:10, 18, 25; 930:10,
 19; 931:6, 15, 24; 932:18, 22; 933:11,
 14; 938:1, 4, 11, 18, 24; 943:16, 22;
 944:6, 10; 956:2,
 9; 961:2, 7, 13, 17, 23; 962:12, 17; 963:4,
 6; 964:16, 20; 965:1, 5, 8, 12; 967:3;
 968:15, 21; 986:20; 988:14; 993:8, 13, 16;
 994:3, 15, 19; 995:2, 9, 20; 996:2, 11, 16,
 25; 1010:7; 1014:16; 1024:17, 20;
 1025:17, 22; 1037:22, 25; 1038:18;
 1040:2, 18; 1041:17;
 1065:2, 15, 17; 1066:1, 15; 1067:10, 15;
 1068:2, 7, 11, 14, 18, 21; 1069:5, 15, 21;
 1070:5, 10, 16, 21, 25; 1071:3; 1076:16,
 21; 1077:3; 1080:17; 1081:8; 1087:9, 17,
 21; 1088:2, 6; 1102:22, 25; 1104:11, 22;
 1105:7, 12, 21; 1106:9, 24; 1108:6, 17;
 1109:14,
 17, 23; 1112:5, 9; 1114:4
 John [1] 997:2
 Joint [15] 910:5, 8, 16, 17; 911:12;
 915:17, 25; 916:21; 919:15, 23; 932:9,
 13; 934:8; 996:12; 1033:25
 joint [1] 922:7
 Joints [1] 941:7
 JSC [3] 919:18; 997:17; 1025:4
 Judge [7] 1004:22; 1021:10; 1038:22;
 1040:6; 1067:20; 1095:4; 1096:8
 judge [1] 1090:17
 judgement [5] 918:10; 942:11; 972:15;
 980:14, 17
 judgements [1] 921:15
 judges [1] 1038:21
 judgment [6] 1054:16; 1094:10;
 1098:11, 13; 1099:5, 22
 judgments [1] 1103:6
 judiciary [2] 1041:9, 10

K

K-A-T-R-I-N-A [1] 1038:10
 Katrina [2] 1038:10; 1040:10
 keep [2] 959:12; 1013:3
 Kendall [3] 994:17, 20; 1108:10
 Kevin [6] 1038:14, 18; 1040:16, 18, 23;
 1041:6
 key [3] 917:5; 921:7; 1042:20
 kicks [1] 970:4
 kindly [1] 1081:17

kinds [3] 920:20; 985:21; 1009:16
 knowing [2] 1098:10; 1105:5
 knowledge [3] 949:16; 974:19; 985:1

L

la [1] 986:7
 label [2] 992:25; 1006:3
 labeled [1] 1105:15
 lack [1] 918:11
 lacks [1] 1065:21
 LANE [66] 910:23; 911:5; 912:11, 15;
 913:5, 9; 916:17; 917:4, 20, 23; 918:14,
 18; 919:3; 923:18, 20; 927:14, 23;
 930:8, 14, 22; 960:23; 961:4, 25; 962:5;
 1025:23, 25; 1034:9; 1036:4; 1037:24;
 1041:19, 21; 1045:10, 12; 1046:25;
 1060:6, 13,
 19; 1065:13, 16; 1066:17; 1067:12, 16,
 20; 1068:5, 9, 12, 15, 19; 1070:2, 23;
 1071:5, 14; 1076:9, 18; 1077:12; 1080:19;
 1081:12; 1082:5; 1083:25; 1087:7;
 1096:10, 13, 16; 1104:9; 1108:15;
 1112:14
 Lane [32] 910:22; 911:4; 914:12, 15;
 915:19; 916:1, 7, 15; 917:16; 919:5;
 923:17; 933:7; 961:23; 962:9; 1025:22;
 1037:22; 1041:17; 1066:3, 15; 1070:21;
 1076:21; 1087:9; 1090:5; 1094:20;
 1096:7; 1104:17; 1105:17; 1107:14;
 1108:13; 1113:6, 14,
 17
 large [4] 934:7; 941:14; 945:14;
 1039:17
 largely [3] 943:4; 952:6, 7
 larger [4] 929:18; 942:20; 957:14;
 1030:1
 largest [3] 939:10, 12; 967:23
 last [10] 916:6, 22; 956:16; 1023:12;
 1039:1; 1050:6, 8; 1063:23; 1078:20;
 1090:4
 late [2] 954:20; 1081:16
 latest [1] 998:22
 latter [1] 1002:16
 Laughter [5] 919:2; 978:14; 988:18;
 1112:13, 16
 launch [1] 921:3
 law [7] 1038:15, 24; 1041:2, 7; 1105:2,
 16; 1107:23
 lawyer [2] 1038:13, 20
 leading [2] 936:23; 937:7
 leave [5] 1082:18, 25; 1087:23;
 1106:19, 22
 left-hand [6] 933:24, 25; 934:21;
 1062:8; 1078:3; 1110:5
 length [1] 949:2
 letter [1] 933:12
 letters [3] 1037:6, 7; 1085:7
 level [9] 915:5, 6; 916:5; 918:12; 942:9;
 946:9; 953:16; 1018:1; 1101:3
 leveled [2] 945:1; 1012:6
 levels [1] 981:14
 license [3] 1052:1; 1053:7; 1056:14
 Lifetime [1] 955:5
 likelihood [2] 1020:21; 1083:14
 likes [1] 984:4
 limit [1] 1052:12
 limited [2] 923:3; 1052:21
 limits [1] 1001:21
 Line [2] 1008:11, 23
 line [29] 914:23; 935:20; 943:13, 14;
 956:22; 958:7, 11; 969:10; 973:25;

974:1; 1014:10; 1025:9; 1028:21;
 1061:19; 1071:6; 1072:11; 1073:19, 20,
 24; 1074:6; 1079:7, 16; 1080:13, 21;
 1082:11; 1088:11; 1090:4; 1096:17;
 1101:16
 lines [6] 914:20; 929:24; 943:10;
 1041:1; 1080:9, 21
 lineup [1] 1100:25
 list [8] 926:7; 974:25; 1037:8; 1043:24;
 1056:16; 1057:5; 1074:21; 1085:18
 listed [13] 934:21; 935:5; 974:18, 22;
 1037:6, 7; 1054:12; 1056:13; 1070:3;
 1084:14; 1085:19; 1104:1; 1112:11
 listing [2] 973:16; 1074:24
 listings [1] 1081:23
 litigated [1] 972:12
 litigation [5] 998:10, 25; 1039:14, 16;
 1040:20
 litigator [1] 1039:7
 live [3] 934:24; 942:17; 1058:8
 local [23] 942:9; 947:15; 955:1; 979:17;
 980:7, 16; 982:4, 11; 983:1, 19; 984:3;
 987:9, 10; 988:23; 989:5; 1005:17;
 1008:19; 1064:5, 6; 1090:24; 1091:8
 locally [3] 980:10; 1004:11, 14
 locate [1] 1043:6
 log [1] 1081:17
 logical [3] 956:3; 979:11, 19
 looks [4] 956:16; 1073:5; 1081:10;
 1101:4
 Los [1] 1002:2
 lot [11] 916:23; 917:12; 984:21; 985:7;
 989:24; 1040:20, 23; 1065:23; 1095:21;
 1102:2; 1113:17
 lots [1] 1008:19
 low [4] 940:9; 1016:23; 1019:19; 1022:8
 lower [5] 980:5; 982:13; 1018:2;
 1020:8; 1097:23
 lowest [1] 957:12
 lunch [2] 993:17, 19

M

M-C [1] 1040:3
 mainly [1] 1040:19
 major [3] 944:5; 1058:4, 6
 majority [1] 982:2
 manageable [1] 931:19
 Management [1] 922:8
 management [2] 922:23; 927:10
 manager [5] 934:12; 935:10, 24;
 1075:9; 1084:14
 managers [15] 934:15; 938:2, 6, 10, 17;
 939:4, 18, 21, 25; 942:4, 6, 8, 11;
 969:14, 15
 manner [2] 1056:11; 1098:13
 March [6] 1046:3, 4, 7; 1047:4, 12, 24
 margin [1] 1099:9
 marginally [1] 1097:23
 mark [3] 967:14; 973:4; 1097:14
 marked [16] 932:9, 12; 933:1, 4; 935:9;
 973:1, 10; 996:6; 1016:9; 1024:24;
 1060:16; 1061:20; 1071:11; 1074:6;
 1076:13; 1077:8
 market [24] 920:18; 921:3, 9, 20; 966:9;
 979:16, 18; 980:6, 9, 11; 981:18;
 982:11; 984:19; 989:4; 1004:11; 1005:7;
 1009:17, 18; 1051:9; 1064:3; 1090:25;
 1091:4, 5
 Marketing [5] 926:20; 951:1; 1033:14;
 1034:3; 1082:15
 marketing [1] 934:11

marketplace [7] 921:14, 922:12;
929:20; 989:23; 1009:14; 1052:1;
1053:11
markets [3] 982:3, 6; 1005:22
married [1] 1038:11
master [1] 923:12
match [1] 1061:4
matches [1] 1079:13
matching [1] 1061:5
Material [1] 982:18
material [2] 982:16; 1110:5
mathematical [2] 1069:9, 10
mathematics [1] 943:19
matter [12] 914:11; 932:3; 964:21;
965:5; 996:9; 1025:3; 1038:2; 1041:14;
1105:16; 1113:13, 25; 1114:7
matters [2] 964:17; 1112:10
maximize [1] 986:12
Mayer [1] 1038:25
McCombs [1] 1040:3
mean [27] 918:18, 19, 23; 922:15;
925:2, 16; 946:10; 986:15; 988:19;
1003:12, 14; 1019:15; 1020:7; 1029:2;
1031:11, 19; 1033:10; 1035:18; 1044:7;
1047:18, 20; 1049:6; 1054:1; 1079:10;
1080:12; 1099:8
meaning [1] 1069:11
meaningless [1] 931:2
means [7] 975:22; 1022:20; 1023:1;
1029:5; 1078:2; 1080:4; 1105:16
meant [3] 918:22; 1027:23; 1054:2
measure [4] 987:12; 1009:21; 1094:11;
1107:18
measured [1] 1062:19
mechanics [1] 961:3
Media [1] 922:8
median [2] 1018:22; 1019:2
meet [1] 999:9
meeting [4] 922:12; 1079:21, 25;
1080:7
memory [1] 910:6
mention [2] 1036:8; 1039:10
mentioned [8] 994:9; 1011:5; 1012:5;
10; 1013:22, 23; 1023:15; 1100:16
menu [2] 985:9, 11
method [1] 966:14
methodological [2] 970:14, 16
methodologies [2] 966:17; 1035:2
methodology [20] 916:19; 926:17, 18,
23; 927:5; 937:5; 940:21; 944:3;
945:14; 952:13, 24; 953:24; 955:10;
957:10; 966:11; 971:11, 13; 992:11;
1030:6; 1089:17
middle [1] 915:6
mild [1] 954:2
million [1] 944:11
mind [13] 916:1; 918:19; 929:14; 995:3;
1053:18, 19, 23; 1057:22; 1059:9;
1062:24; 1096:12; 1103:18, 20
minds [1] 911:15
mine [1] 1025:21
minus [5] 1019:17; 1020:3, 13;
1029:25; 1058:4
minuta [6] 916:22; 956:6; 1034:25;
1072:6, 10; 1096:18
minutes [6] 911:22; 1041:13; 1086:24;
1087:4, 6; 1110:13
misleading [1] 1105:18
missed [3] 967:3; 1038:16; 1080:18
missing [1] 1113:7
misspoken [1] 976:5

mistaken [1] 1036:25
mistakenly [3] 1035:8, 19; 1036:1
mix [3] 983:20; 1099:14; 1101:12
modification [1] 926:22
modifications [4] 921:16; 925:23;
926:14; 941:12
moment [5] 1065:15; 1068:2; 1070:24;
1073:4; 1107:14
Monday [2] 1024:16, 21
money [1] 989:24
Montana [2] 1002:2; 1005:13
months [1] 924:3
morning [7] 919:20; 968:24, 25;
1000:24; 1013:24; 1017:13; 1080:24
motion [20] 910:8; 913:19; 919:4, 5;
928:11, 15; 929:1; 961:10, 19; 962:22;
964:16, 21; 965:13; 994:6; 1024:21;
1070:6; 1076:22, 25; 1113:15, 24
motions [3] 919:9, 15, 18
motivated [1] 1003:25
move [15] 912:8; 928:23; 941:2;
960:20; 963:2; 965:10; 990:18; 994:6;
1020:19; 1024:13; 1033:2; 1034:14, 17;
1064:23; 1076:10
moved [2] 1034:12, 13
movie [3] 937:14, 16; 957:14
Movies [1] 928:5
movies [43] 934:25; 936:17; 937:25;
938:6, 12, 16, 23; 939:2, 5; 942:17, 20;
943:8, 14, 18, 23; 948:8; 950:1; 951:20,
23; 953:11; 958:12; 959:18; 960:4;
963:10, 13, 20, 24; 964:1, 4; 966:6;
967:25; 968:7, 14; 969:8; 974:10; 975:1;
1006:11;
1007:1; 1008:12, 21, 24; 1049:2; 1058:9
Moving [1] 952:20
moving [1] 945:9
MPAA [4] 914:16, 22; 928:13; 1112:21
Mr.Chairman [2] 1071:6; 1108:16
Mr.Lane [1] 1088:1
Mr.Stewart [1] 1108:7
Mr.Trautman [2] 1076:5; 1105:11
Ms [1] 956:20
MSO [15] 921:11; 935:10, 23; 936:15;
938:2, 6, 10; 939:5, 7, 12, 15; 942:4;
971:4, 6, 9
multi-page [1] 1071:22
multiple [5] 921:10; 934:10; 938:21;
939:10; 969:16
Murder [1] 954:23
myself [2] 927:12; 1020:9

N

NAB [2] 941:5; 1011:8
nah [1] 1011:12
name [14] 920:11; 969:1; 1038:10, 14,
17; 1040:1, 2; 1041:2; 1074:25;
1075:14, 16; 1084:12, 13, 15
narrow [1] 930:5
National [1] 997:3
national [1] 980:22
nature [4] 914:14; 915:8; 975:8;
1040:14
NBA [3] 1039:8, 14, 22
needs [2] 987:1; 1113:17
NEIMAN [68] 913:21; 919:8, 13, 21, 23;
920:10; 923:15; 927:17; 928:12, 23;
929:2; 930:11; 931:9, 23; 933:8, 13, 19;
935:18; 936:4; 939:6; 941:1; 944:24;
947:8; 949:17; 955:9; 957:4; 958:5;
960:17, 24; 961:12, 16, 22; 962:4, 8, 15,

25; 963:5,
15; 964:14, 19, 24; 965:7, 10, 14; 967:4,
14, 16; 968:8; 996:9, 12, 18; 1025:2, 12,
19; 1035:20; 1064:25; 1065:3; 1069:7, 19,
24; 1070:4, 7, 14; 1077:2; 1081:10;
1088:3; 1108:11, 20
Neiman [3] 913:20; 956:2; 1013:22
network [9] 947:14; 954:22; 1006:4, 16,
21; 1007:16; 1035:9; 1036:2; 1101:10
network-affiliated [1] 1007:11
networks [17] 920:24; 921:1, 2, 4, 7, 8,
14, 17; 936:25; 937:11; 954:19, 21;
955:2, 5; 1091:12
News [1] 928:7
news [29] 935:2; 950:5; 953:17; 954:13,
15; 955:8; 960:6; 963:10, 13, 21, 24;
964:2, 5; 974:11; 975:2; 984:11; 986:3;
987:9, 10; 1006:12; 1007:2; 1008:14,
19, 20, 25; 1009:6, 9, 12
Nielsen [1] 1112:23
night [3] 912:4; 956:17; 1039:1
nine [3] 987:23; 988:3; 1078:13
nobody [1] 931:21
non-commercial [1] 1089:6
non-network [1] 1006:23
Nos [1] 1077:9
note [2] 952:11; 973:2
noted [2] 1017:12; 1079:21
notes [1] 991:11
notice [2] 1025:13; 1097:12
noticeably [1] 971:1
noticed [2] 1025:5; 1097:12
notion [4] 949:3, 7, 9; 1024:8
November [1] 1112:25
nowhere [1] 930:16
nth [1] 1095:24
Number [12] 910:6, 18; 932:3; 933:16;
964:13; 996:7; 1008:11, 23; 1021:2;
1025:1; 1060:7; 1077:5
number [85] 912:5, 6; 913:5; 916:3;
929:8; 931:16, 22; 948:11, 12, 14, 15,
17, 19; 949:20, 22, 25; 960:1; 961:1;
962:20; 964:10; 974:2, 23; 976:1; 978:5;
980:2, 8; 983:1, 3, 15; 987:21; 990:24;
991:10, 18, 20; 1009:12; 1018:23;
1025:14; 1027:15,
18, 19; 1032:2; 1040:16; 1042:14, 15, 20,
22, 23, 25; 1044:24; 1053:12; 1058:24,
25; 1059:5, 6, 10, 12, 14; 1060:12;
1061:21, 22; 1062:2, 5; 1071:15; 1072:12;
1074:1, 6, 9, 10; 1075:1, 2, 4, 15; 1076:6;
1078:5, 6; 1081:9; 1082:11, 15, 18, 25;
1083:12; 1092:15;
1093:2; 1098:20
numbers [28] 916:12; 917:13; 918:2;
929:19; 960:10, 19; 961:14; 962:7, 10;
971:21; 990:21, 23; 991:23; 1016:9;
1023:25; 1059:3; 1061:2, 5, 23; 1062:7;
1065:11; 1066:4, 14; 1067:6; 1069:25;
1088:18; 1093:23; 1101:7
numeral [7] 927:22, 24; 930:13; 961:21;
964:23; 965:8, 11
numerical [2] 929:6; 974:17

O

object [5] 994:22; 1064:25; 1066:2, 12;
1069:13
objected [1] 911:24
objection [26] 910:21, 24; 911:4;
918:11; 930:20, 21, 22; 931:21; 933:7;
961:18; 964:21; 965:13; 994:15; 995:3,

23, 25; 996:3; 1024:17, 20; 1065:18, 20;
 1077:1, 2; 1088:3; 1106:10
 objections [12] 913:19; 915:19; 928:25;
 931:7; 932:8; 964:20; 965:12; 994:3;
 1065:18; 1076:16; 1077:3; 1088:2
 objective [1] 1009:20
 observation [6] 977:22; 978:3, 20;
 980:13; 999:14; 1001:17
 observations [2] 974:24; 978:18
 observing [1] 990:4
 obtain [3] 966:17, 19; 1043:11
 obtained [11] 941:16, 19; 948:5; 953:7;
 966:19; 1004:14; 1046:12; 1048:15;
 1072:3; 1085:10, 11
 occasion [2] 932:24; 1058:3
 occasions [2] 929:24; 1083:23
 occur [2] 981:25; 997:24
 occurred [2] 950:14; 966:4
 offer [4] 987:18; 988:6; 1003:22;
 1024:15
 offered [1] 985:9
 Office [6] 1043:7; 1046:14; 1047:7;
 1048:3; 1085:13; 1112:21
 Oh [8] 935:17; 1012:21; 1014:18;
 1021:7; 1024:13; 1067:15; 1081:22;
 1109:19
 oh [1] 1089:23
 Okay [67] 913:8; 916:15; 919:21;
 926:22; 931:23; 948:11; 956:10; 961:23;
 962:15; 963:4; 968:21; 972:25; 976:8;
 991:17, 23; 993:3, 12, 15; 1006:6;
 1011:9; 1012:10; 1013:2; 1016:1;
 1017:24; 1018:9; 1024:11; 1028:12;
 1032:8; 1042:25; 1044:6;
 1054:13; 1055:9; 1057:24; 1062:7, 10, 23;
 1063:6; 1066:15; 1068:5, 9; 1069:5;
 1071:5; 1073:9, 19, 23; 1074:5; 1076:4;
 1078:24; 1079:4, 15; 1080:1, 16, 20;
 1082:24; 1083:4, 11; 1084:1, 11; 1085:14,
 17; 1089:5, 11; 1090:3; 1094:13; 1108:20;
 1111:8, 14
 okay [5] 914:4; 1012:21; 1014:18;
 1058:16; 1113:21
 omitted [7] 949:12; 957:24; 1035:8, 19;
 1036:1; 1037:8, 12
 one-fifth [3] 1035:7; 1036:1; 1037:13
 one-firth [1] 1037:10
 one-page [1] 1060:7
 ones [4] 915:6, 7; 994:25; 1061:4
 operate [1] 971:7
 operating [3] 1002:1; 1051:25; 1100:7
 operator [61] 915:6; 921:10; 923:22;
 934:11; 959:23; 967:18; 969:19; 978:24;
 979:21; 980:15, 17; 981:16, 19; 983:10,
 18; 984:22; 987:1; 988:6, 12; 989:8;
 995:7; 997:9; 1001:20; 1003:22, 25;
 1004:5, 16, 20; 1005:6, 11, 13; 1007:9,
 10, 19, 25;
 1008:2, 16, 18; 1009:4, 14; 1022:11;
 1053:22; 1063:11; 1066:5; 1094:6;
 1098:9; 1099:5, 23; 1100:4, 5, 12, 25;
 1102:13; 1103:5, 19, 20; 1111:15, 17, 22
 operators [37] 915:5; 916:5; 920:25;
 922:6, 10; 923:6; 937:1; 939:11; 944:18,
 22; 949:6; 968:6; 969:14, 18; 977:24;
 978:6; 979:5; 980:23; 984:16; 986:6;
 990:4, 6; 991:2; 1000:17; 1001:25;
 1002:4; 1004:9; 1005:17, 19, 21;
 1021:12; 1042:6; 1049:3,
 8; 1050:9; 1051:12; 1109:3
 opinion [6] 917:13; 943:6; 966:15;

984:18; 1023:17; 1111:21
 opportunities [1] 921:9
 opportunity [8] 921:2, 13; 956:19;
 985:12, 16; 1065:4; 1070:8; 1076:23
 oppose [1] 1068:23
 options [2] 986:22; 1101:14
 order [16] 919:19; 921:11; 939:16;
 940:2, 25; 946:9; 950:4; 966:19; 974:17;
 977:19; 979:17; 999:9; 1000:19;
 1041:25; 1074:22; 1108:18
 orderly [1] 911:3
 organization [1] 1024:2
 original [2] 912:18; 1043:24
 originally [5] 1031:12; 1032:3, 5;
 1042:18; 1043:13
 Outside [1] 1020:10
 outside [2] 1020:2, 12
 overall [9] 946:1; 947:17; 948:3;
 952:17; 976:13; 1059:15; 1099:14;
 1100:7
 overlap [1] 983:4
 overlooked [1] 1106:2
 overruled [1] 932:9
 owned [2] 938:20, 21

P

P-R-O-C-E-E-D-I-N-G-S [1] 910:1
 p.m. [7] 993:19; 994:2; 1041:15, 16;
 1070:20; 1114:6
 package [6] 937:19; 986:9, 14; 988:2,
 13; 1004:1
 packages [2] 985:9; 986:8
 Page [16] 959:22; 1010:15; 1013:2, 4,
 17; 1015:6, 18; 1016:5; 1030:9;
 1034:25; 1035:4; 1037:3, 14; 1045:13;
 1079:18
 page [69] 916:21; 925:14, 15; 927:23;
 930:13; 940:10, 11; 950:7; 951:5; 952:3;
 959:13, 15, 21; 960:18; 961:11, 20;
 962:2; 963:16; 964:9, 22, 23, 24; 965:2;
 967:2; 969:11; 973:24; 974:3; 978:19;
 990:14; 1008:7, 10; 1009:10, 12;
 1030:8; 1042:19;
 1045:11; 1048:21, 25; 1050:4; 1057:6;
 1072:5, 6, 8, 9; 1073:4, 5, 6, 9, 11, 21, 24;
 1074:5; 1075:13; 1078:20, 24; 1079:6, 17;
 1080:21; 1083:7; 1085:6; 1086:8, 23;
 1088:16; 1090:4; 1091:7; 1110:4, 5
 page34 [1] 1045:17
 page54 [1] 1053:13
 Pages [3] 1013:20; 1030:24; 1035:1
 pages [8] 957:9; 965:6; 1013:8;
 1030:14, 16; 1045:5; 1073:6; 1077:18
 paid [24] 977:6, 8, 14, 20; 1046:16, 22,
 23; 1055:24; 1059:18; 1066:5, 7;
 1091:25; 1092:23; 1095:24; 1098:9;
 1099:19; 1100:10, 12; 1102:15;
 1103:17; 1107:11, 20, 24, 25
 panel [18] 915:16; 918:9, 10; 920:12;
 922:18; 929:4; 941:9; 950:11; 957:6;
 973:1; 974:5; 999:14; 1016:7; 1025:20;
 1074:19; 1087:15; 1112:20; 1113:19
 panky [1] 914:20
 paragraph [9] 952:4; 1035:5; 1042:20;
 1045:18; 1048:24, 25; 1050:5, 8;
 1053:16
 Pardon [2] 994:19; 1045:3
 Part [1] 1111:3
 part [9] 921:7; 932:24; 933:7; 945:14;
 969:7, 24; 983:23; 1044:7; 1072:24
 Part6 [1] 1111:3

Partially [1] 1110:20
 partially [1] 1110:22
 participants [1] 920:23
 participate [1] 1010:24
 parties [5] 924:22; 925:21; 926:15;
 956:19; 959:1
 partner [2] 1039:5, 6
 passed [1] 949:8
 pattern [3] 967:23; 1000:6; 1091:16
 patterns [1] 1090:16
 Paul [1] 936:10
 pay [11] 936:25; 937:14; 986:10;
 1056:10; 1063:12, 14; 1094:7, 10, 12;
 1101:4; 1108:25
 paying [1] 1093:6
 payment [10] 1062:21; 1063:3, 8, 10;
 1069:12; 1092:19; 1097:23; 1099:19;
 1100:24; 1109:6
 payments [19] 942:1; 946:14; 949:5;
 1032:18; 1053:3, 10, 18; 1055:23;
 1056:3, 5, 9, 25; 1057:3; 1060:2, 10;
 1087:20; 1094:17; 1097:22; 1105:14
 pays [4] 1059:21; 1092:1, 5, 14
 PBS [151] 928:8; 934:22; 950:6;
 963:10, 13, 21, 24; 964:2, 5; 969:9, 11,
 18, 20, 25; 970:3, 7, 9, 10, 15, 21, 25;
 971:8, 10, 19, 25; 972:17; 973:1, 3, 11,
 22; 974:11; 975:2, 17, 25; 976:4;
 977:24; 978:6, 20, 24; 979:13, 17, 18,
 23; 980:1,
 4, 7; 981:4; 982:1, 4, 19, 22; 983:1;
 984:13, 20; 985:5; 986:3; 987:5, 11;
 988:20, 24; 989:2, 5; 990:2, 5, 7, 16, 23;
 991:3, 18, 25; 992:8, 15, 20; 994:7; 996:1,
 7; 1004:19; 1007:5; 1008:14, 25;
 1058:12, 14, 15; 1059:17; 1060:2, 9, 10;
 1061:1, 2, 9; 1062:15,
 20; 1063:1, 12, 19; 1064:1, 5, 6, 11, 19,
 21; 1065:6, 8, 10; 1067:1, 3, 4, 6, 21, 22;
 1069:8, 17; 1070:2; 1087:12, 19; 1088:17;
 1089:19; 1090:8; 1092:2, 19; 1093:17, 21;
 1094:16, 17; 1095:2, 16; 1096:3; 1098:10;
 1100:1, 3, 18; 1101:3, 5, 9; 1102:12, 13,
 17;
 1103:13, 25; 1105:2, 4, 14, 15; 1107:11,
 18, 20, 24
 pending [2] 919:9; 1076:22
 penetration [1] 921:20
 penny [1] 1101:8
 pension [1] 1040:22
 People [1] 1057:11
 people [4] 987:4; 988:21; 1033:2;
 1093:18
 perceived [1] 943:5
 percent [115] 940:3; 963:9, 17, 19;
 964:10; 965:3; 1001:3, 5; 1008:12, 13,
 14, 24, 25; 1009:1, 10, 12; 1012:15;
 1015:1, 7, 22, 23, 25; 1016:15, 21, 25;
 1017:3, 7, 17, 19, 21; 1018:1, 2, 3, 6, 7,
 11, 12, 15, 17, 18, 19, 23; 1019:3, 8, 9,
 10,
 24; 1020:1, 4, 10, 11, 22; 1021:19, 20, 23;
 1022:10, 19, 20, 21, 23, 25; 1023:1, 3, 9;
 1024:1, 4; 1026:3, 9, 18, 19, 21; 1027:1, 6,
 23; 1028:5, 13, 15; 1029:11, 21, 22;
 1058:1; 1062:13, 21; 1063:2; 1064:1, 20;
 1065:5; 1067:1, 22; 1068:6, 8; 1088:17;
 1090:9,
 14, 15; 1092:5; 1093:16; 1095:2; 1100:1,
 2; 1107:4; 1111:4, 5, 7
 Percentage [1] 1105:15

percentage [1] 917:7, 939:1, 951:12, 15; 975:15; 976:3; 982:12; 983:9; 1053:22; 1055:8, 10; 1056:21; 1060:3; 1069:8; 1092:14; 1095:23, 24, 25; 1104:5; 1105:4; 1107:18, 19; 1108:2 percentages [2] 1103:25; 1110:16 perception [6] 937:4; 1054:21, 24; 1055:1, 18 perform [3] 921:17; 1005:1; 1057:6 performed [6] 934:14; 936:3; 998:5, 25; 999:4, 10 period [31] 929:19, 22, 25; 930:4; 937:17; 942:23; 943:2; 954:1; 955:6; 966:18; 967:19; 982:16, 23; 983:2; 988:23; 1045:14, 15, 23; 1046:6, 14; 1047:4, 6, 9, 10, 17; 1048:4; 1078:5; 1082:21; 1099:16, 20 periods [1] 953:20 permitted [1] 1111:2 person [8] 994:11; 1025:4; 1063:1; 1083:17; 1084:19, 20; 1085:1, 4 personally [1] 1031:18 perspective [1] 1001:8 phone [1] 1074:1 phrase [1] 1018:14 phrased [1] 1029:13 pick [4] 985:10; 986:8, 21; 1097:8 picked [1] 1009:11 picking [4] 957:5; 990:8; 1000:15; 1045:14 picture [1] 987:10 pieces [1] 1075:1 place [9] 930:9; 931:12; 943:10; 971:25; 990:5, 11; 1014:7; 1045:1; 1110:24 placed [5] 934:15, 16; 990:9; 1062:2; 1111:17 planning [2] 920:18; 921:19 Platt [1] 1038:25 plausibly [1] 980:18 Please [2] 956:25; 1013:24 please [7] 920:7; 946:7; 973:15; 983:25; 996:23; 1060:12; 1072:6 Plus [1] 912:11 plus [6] 987:11; 1019:17; 1020:3, 13; 1029:25; 1058:3 point [38] 915:12, 14, 24; 916:6; 917:4; 925:3; 929:7; 935:16, 23; 936:5; 938:5, 11; 939:1; 944:15, 17; 953:23; 958:17; 967:9; 970:12; 971:24; 995:18; 996:19; 1002:5; 1013:25; 1014:8, 11; 1019:14; 1020:5, 20, 22; 1021:22; 1022:22; 1055:10; 1083:6; 1084:24; 1099:4; 1113:23 pointed [2] 912:24; 1090:5 pointing [1] 915:18 Points [2] 935:24, 25 points [10] 914:13; 917:7; 935:22; 936:2; 997:6; 1020:13; 1026:10; 1028:20, 22; 1058:4 popular [1] 1085:15 population [5] 1000:14, 18, 20; 1020:12; 1028:6 portion [3] 1006:24; 1092:22; 1110:19 posited [1] 1004:22 position [5] 995:11; 1039:5, 19; 1075:16; 1088:21 positioned [1] 981:16 positioning [1] 921:16 positive [1] 1040:4 possibility [1] 986:6

potential [7] 921:20, 21; 1004:2, 6; 1005:5; 1009:5; 1044:1 power [1] 1040:20 practical [1] 1086:11 practice [4] 920:17; 922:5; 1038:15; 1040:15 practitioner [1] 1040:19 precise [4] 935:6; 985:8; 1011:16; 1092:17 precisely [2] 1001:16; 1099:4 predecessors [1] 1024:2 predict [1] 1021:4 predicts [1] 1010:1 prefer [2] 933:24; 1076:24 preferred [1] 918:19 prejudices [1] 932:7 prejudicial [2] 911:17; 933:17 premium [1] 937:21 preparation [3] 925:1; 998:13; 1010:25 prepare [7] 911:19, 21; 923:21; 924:1, 4; 1010:19; 1104:18 prepared [17] 911:13; 923:9, 24; 924:2, 6; 925:8, 21; 927:2; 936:20; 972:9; 998:10, 12; 1025:4; 1037:11; 1066:4; 1077:4; 1108:13 present [7] 916:13; 919:6; 982:17; 983:8; 1064:5, 7; 1105:14 presentation [3] 931:11, 14; 935:7 presented [11] 911:8; 923:23; 924:11; 940:16; 970:21; 983:8; 1014:17; 1050:20, 22; 1105:6, 17 presenting [4] 926:23, 25; 932:25; 938:19 President [2] 920:16; 1038:19 presumably [3] 913:14; 914:22; 1044:15 prettier [1] 1024:15 pretty [6] 990:18; 1016:8; 1038:20; 1067:2; 1079:10, 11 previous [5] 916:9; 951:7, 17; 953:8; 1058:4 previously [4] 996:5; 1034:21, 23; 1077:8 price [1] 937:20 primarily [3] 918:1; 920:22; 921:1 primary [2] 943:1; 986:25 principally [1] 925:20 prior [13] 911:11; 948:5; 951:10, 13; 952:19, 22; 955:25; 958:3; 971:1; 998:25; 1010:19; 1078:16; 1085:8 Probability [1] 1023:4 probability [14] 1003:11, 13; 1017:4, 6; 1018:22; 1019:5, 14, 15, 19, 21; 1023:3, 7, 9; 1029:7 probative [1] 995:17 problem [6] 911:16; 970:14; 1041:4, 7, 10; 1094:15 problems [2] 952:15; 1106:6 procedural [1] 914:11 procedure [4] 947:3, 6; 1003:4; 1104:20 procedures [2] 1002:8; 1109:7 proceed [8] 933:10, 18; 956:10; 968:17; 1041:18; 1070:14, 22; 1113:10 proceeding [28] 923:2; 924:7, 9; 936:2, 3; 943:4; 945:1, 16; 952:6, 7; 957:18, 23, 25; 966:3; 967:22; 972:10; 982:12; 997:24; 999:6; 1002:7; 1006:19; 1007:7; 1012:15; 1053:5; 1069:4; 1079:5; 1112:24 proceedings [16] 910:4; 922:3, 20, 23;

923:7; 927:2; 934:2; 936:21; 949:14; 956:7; 958:3; 993:18; 997:23; 1070:19; 1071:1; 1114:6 process [7] 914:17; 941:25; 945:7; 947:6; 977:4; 989:21; 1036:7 processing [1] 1048:2 produce [6] 940:18; 960:18; 1000:19; 1009:25; 1010:22; 1024:3 produced [1] 962:10 product [1] 954:18 professional [3] 934:25; 942:17; 1058:8 profile [3] 954:25; 1091:8, 12 Program [6] 910:23; 1064:23; 1071:7; 1076:5; 1109:12 program [15] 920:23; 950:15; 974:10; 979:22; 1004:14; 1006:7; 1007:13, 15, 21; 1009:21; 1051:13; 1052:8; 1059:23; 1085:18; 1093:4 programming [89] 920:24, 25; 921:2, 4, 7, 11, 13; 934:11, 19, 23; 935:1; 936:22, 24; 937:1, 6, 10, 19; 938:15; 942:9; 943:18, 24; 950:19; 953:3; 954:22; 955:23; 957:15; 959:23; 967:24; 969:19; 974:4; 975:3; 976:4; 978:8, 21; 979:5, 6, 18, 20; 980:19, 24; 981:4, 6, 20; 983:16, 20; 989:10, 22; 990:1; 997:9; 1004:5; 1005:10; 1006:17, 22; 1007:2, 6, 7; 1009:4; 1011:15, 19; 1016:23; 1025:14; 1049:9, 12, 19; 1051:7, 21, 23; 1052:5; 1053:4, 25; 1054:11, 17; 1055:2, 5, 6, 18, 22; 1058:5, 7; 1084:21; 1085:5; 1086:4; 1100:25; 1101:3, 12; 1111:17, 25 programs [7] 935:3; 985:10; 989:25; 1000:3; 1006:13, 23; 1007:14 project [2] 949:5; 1002:19 projectable [3] 941:24; 946:15; 947:10 projecting [3] 921:20; 947:13, 17 projection [1] 945:21 projections [1] 1002:10 projects [1] 920:20 prominent [1] 1038:20 promptly [1] 1113:19 proper [2] 1066:13; 1094:4 proportion [4] 976:21; 977:1; 1091:24; 1092:18 proportionate [1] 977:8 proportionately [1] 980:5 proportions [1] 976:23 propose [1] 993:5 proposing [3] 910:17; 960:25; 1051:18 proposition [1] 983:17 prospects [1] 921:5 provide [11] 933:9, 11; 960:15; 967:12; 981:17; 1002:14; 1004:1; 1075:22; 1092:17, 18; 1112:22 provided [5] 928:13; 962:9; 1035:25; 1057:6; 1084:13 provides [1] 1095:15 provision [1] 912:7 provisions [1] 912:4 PS [5] 1060:16; 1071:11; 1076:13; 1077:9; 1105:9 PTV [1] 973:3 Public [3] 969:2; 994:10; 1088:10 public [23] 928:7; 935:2; 980:10, 16, 18, 21; 981:12; 982:9; 983:12, 16, 18; 984:4; 1006:5; 1089:7, 12, 19, 21; 1090:24; 1091:4; 1092:23; 1093:3, 6 purchased [2] 1057:1, 2

pure [1] 983:22
 purport [2] 944:13, 16
 purportedly [1] 1074:16
 purports [1] 1073:10
 purpose [5] 918:8; 944:19; 1000:10, 11; 1051:5
 purposes [11] 935:15; 956:13; 978:17; 979:11; 982:10; 1002:6; 1005:24; 1034:14, 18; 1086:12; 1088:24
 pursue [1] 995:19
 puts [2] 1103:21, 25
 putting [1] 961:14

Q

quarter [3] 1095:6; 1101:6
 Question [5] 963:19; 964:1; 1013:8, 9; 1021:2
 question [67] 911:6; 912:1; 914:3; 934:17; 936:22, 23; 937:7; 939:23; 940:10, 14; 959:15, 23; 960:9; 961:10, 19; 962:1, 18, 20; 963:7, 8, 17; 964:10; 973:17; 974:9; 975:8; 977:5; 982:13; 984:1; 986:23; 991:6; 992:2; 1021:5, 10; 1023:12; 1027:16; 1030:23; 1037:6, 20; 1049:7, 17, 20, 24; 1050:3, 11, 16, 24; 1051:2; 1053:12; 1054:3; 1056:8, 15; 1066:9; 1069:22; 1084:7; 1085:14, 25; 1086:9; 1087:16, 24; 1096:13; 1106:14; 1108:8, 23; 1111:16, 22
 question4 [1] 1053:17
 questioned [1] 1011:14
 questioning [1] 914:23
 questionnaire [16] 951:2; 952:1, 5; 974:8; 985:4; 1035:14; 1037:3; 1071:23; 1072:8; 1074:9, 10; 1076:6, 20; 1081:18, 21; 1084:20
 Questionnaires [1] 1066:22
 questionnaires [8] 1036:6; 1037:11; 1042:8, 23; 1067:16; 1072:4; 1075:22; 1084:2
 questions [38] 917:25; 918:6; 927:14; 934:4; 936:23; 937:7; 952:11; 960:11, 16; 993:3; 995:25; 1010:5, 12; 1021:2; 1023:12; 1027:5; 1049:1, 11; 1064:22; 1066:10, 14; 1086:6, 13, 15; 1087:7, 10; 1088:24; 1091:20, 22; 1096:8, 9; 1104:9, 12; 1106:21, 23; 1108:7; 1112:4, 6
 quick [1] 1083:16
 quickly [2] 922:4; 1060:25
 quote [1] 1097:18

R

R-H-U-S-E-N [1] 1038:11
 raise [1] 920:1
 random [30] 939:20; 941:15, 21; 945:17, 19, 23; 946:2, 4; 947:20, 23; 948:2, 12, 19; 949:21; 953:1; 1000:10, 11, 18; 1001:9, 15; 1009:23; 1061:22, 23; 1062:4, 5, 7; 1071:15; 1076:6
 range [33] 930:5; 951:16; 971:21; 992:7; 1001:2, 5, 7; 1003:13; 1009:9; 1016:24; 1017:17, 21; 1018:1, 5, 11, 13, 18; 1020:2; 1022:13; 1023:10; 1027:5; 1028:1, 7; 1029:6, 10, 12, 14, 15, 25; 1058:3; 1083:21; 1087:5
 rank [1] 915:7
 ranked [4] 950:2; 951:23; 978:20, 24
 ranking [8] 929:23; 934:24; 948:4;

951:9; 953:6; 1090:14, 15; 1103:6
 rankings [2] 957:12; 968:2
 ranks [1] 1099:8
 rapid [1] 942:25
 rapidly [1] 1019:16
 rarely [1] 985:1
 rate [19] 940:8, 9; 941:20; 1038:23; 1059:18; 1094:8; 1097:19, 20; 1098:4; 1105:1; 1107:4, 6, 10, 24; 1110:7, 14, 23; 1111:9, 11
 rated [1] 1095:5
 rates [7] 1066:7; 1096:19; 1105:1, 24; 1107:7; 1110:6; 1111:1
 rating [1] 981:13
 ratio [3] 1092:16, 17; 1093:9
 rationale [1] 1100:22
 ratios [2] 1094:25; 1099:18
 re-instituted [1] 999:19
 reach [4] 982:7, 8; 1082:23; 1083:17
 Read [1] 1035:20
 read [26] 924:4, 6, 7, 9, 14, 15, 17, 21, 24, 25; 925:3, 7; 956:21; 960:14; 961:4, 15; 963:1, 18; 964:17; 1023:25; 1024:1; 1078:19; 1086:17; 1092:2; 1095:4; 1110:18
 readily [1] 957:2
 reading [6] 925:20; 956:23; 1035:22; 1082:14; 1085:18; 1110:23
 real [3] 914:13; 931:21; 1045:7
 reason [8] 911:15; 949:11; 981:25; 987:5; 1012:13; 1042:12; 1046:11; 1102:13
 reasonable [1] 980:14
 reasons [3] 945:18; 988:12; 1102:14
 rebuttal [5] 916:13; 917:3; 924:21; 925:3; 926:3
 recall [8] 918:6; 977:25; 989:10; 1026:5; 1036:10, 14; 1067:18; 1109:23
 receipts [6] 1092:15; 1095:25; 1096:1; 1111:4, 6, 7
 receive [5] 946:2, 3; 976:16; 989:16; 991:6
 Received [1] 1062:15
 received [8] 942:20; 953:6; 996:8; 1013:23; 1036:24; 1077:11; 1078:5; 1113:1
 recent [4] 924:11; 953:12; 954:16; 955:3
 recess [3] 956:6; 993:17; 1039:25
 recessed [1] 993:18
 recognize [4] 984:23; 1061:20; 1076:19; 1089:6
 recognized [1] 1012:14
 recollection [1] 913:25
 record [57] 911:14; 914:2, 6; 917:1; 928:15, 19, 20; 930:16, 18, 20, 25; 931:1, 11, 13, 19; 932:4; 933:4, 6; 956:8, 13; 960:15; 961:5, 15; 963:2; 964:18; 973:2; 993:7; 994:5, 6, 7; 996:21, 22; 1033:12; 1035:21; 1038:4; 1041:15, 16; 1061:3; 1065:20; 1070:20, 24; 1071:2, 4; 1073:13, 14, 16; 1077:21, 22; 1082:3, 6; 1105:22; 1106:8; 1110:18; 1112:20; 1113:12; 1114:3
 records [8] 1047:5, 6, 15, 19, 20; 1048:2, 15; 1081:23
 recross [1] 918:22
 rectangles [4] 1005:25; 1006:1, 3, 6
 red [2] 943:13; 958:7
 redirect [4] 914:14; 915:9; 918:17, 22

redirection [1] 918:25
 reduce [2] 931:20; 993:6
 reduced [6] 930:17; 931:12; 936:16; 956:12; 967:12; 1065:8
 refer [14] 926:2; 927:22; 933:24; 936:21; 937:5; 940:10; 957:1; 969:4; 997:17; 1030:8; 1049:21; 1072:14; 1078:13; 1085:4
 reference [5] 932:1; 942:25; 1012:17; 1045:19; 1080:14
 referenced [1] 957:8
 referred [9] 925:25; 936:24; 937:12; 942:24; 1002:16; 1007:6; 1053:15; 1057:9; 1077:16
 referring [11] 919:14; 931:17; 1030:14, 16; 1034:25; 1045:8; 1048:22; 1052:16; 1057:10; 1080:18; 1110:17
 refers [5] 925:22; 1078:4, 5, 9, 10
 reflect [14] 934:16; 935:23; 936:2; 955:19; 974:13; 978:5; 984:18; 994:25; 1009:13; 1036:17; 1046:22, 23; 1053:21; 1111:16
 reflected [19] 929:16; 930:3; 978:2; 981:14; 984:5, 13; 987:14; 991:14; 1013:12, 14; 1014:16; 1023:13; 1026:6; 1032:3, 6; 1050:4; 1053:9; 1084:10; 1088:15
 reflecting [1] 976:20
 reflection [2] 1092:22; 1093:17
 reflects [9] 928:20; 935:23; 973:21; 976:2; 995:15; 1003:10; 1013:17; 1023:9; 1094:11
 refusing [1] 995:14
 regard [13] 939:1; 943:23; 945:8; 957:20; 967:7; 982:16; 984:1; 1004:19; 1011:4; 1054:18; 1075:24; 1092:11; 1093:14
 regarding [4] 928:13; 945:7; 1104:16; 1113:15
 Regardless [1] 916:20
 regularized [1] 1077:17
 regularly [2] 947:10; 1005:1
 regulated [1] 937:20
 reiterate [1] 1069:7
 relate [4] 970:15; 1003:16; 1053:17; 1102:11
 related [8] 919:9, 15; 927:3; 952:5; 965:16; 972:17; 1049:20; 1103:17
 relates [6] 1002:24; 1053:13; 1082:6; 1087:12; 1099:23; 1100:23
 relating [3] 919:18; 954:17; 1066:5
 relation [1] 970:25
 relationship [1] 955:8
 relative [14] 921:13; 944:22; 968:2, 5, 11; 977:1; 1009:21; 1012:22, 24; 1051:7, 8; 1054:16; 1055:11; 1101:13
 relatively [15] 923:3; 929:22; 930:4; 939:24; 940:1; 942:16; 954:25; 962:5; 966:18; 971:19; 972:1; 977:25; 984:23; 1039:12; 1064:21
 release [1] 952:22
 relevance [4] 1068:24; 1069:3, 12, 14
 relevant [1] 1052:14
 reliability [5] 966:14, 21; 1023:18, 20; 1024:9
 reliable [2] 940:18; 999:11
 religious [5] 1006:12; 1007:2; 1009:1; 1014:24; 1015:8
 relying [2] 918:15; 1112:23
 remained [1] 950:2
 remember [1] 984:15

remind [2] 1015:20; 1040:6
 remit [1] 1075:15
 remittance [10] 1046:8, 13; 1047:5, 15, 20, 22, 25; 1048:5, 15
 repeat [4] 1004:8; 1056:15, 19; 1111:19
 replete [1] 1105:22
 replicate [1] 1053:10
 replicated [1] 957:10
 report [14] 916:9; 924:11; 925:1, 8, 22; 927:18; 940:10; 942:7; 950:8; 967:6; 969:5; 972:18; 1070:9; 1083:22
 reported [5] 942:7; 1052:18; 1061:2; 1067:4; 1111:2
 reports [12] 923:8; 924:6, 8, 10, 22; 925:20; 926:4, 7, 11, 15; 927:5; 935:10
 Represent [1] 930:19
 represent [15] 931:25; 934:1; 935:24, 25; 950:15; 969:1; 1001:16, 20; 1006:6; 1016:24; 1019:8; 1039:8; 1042:16, 21; 1073:10
 representation [10] 929:6; 930:12; 931:10, 25; 932:6; 933:16; 935:15; 977:2; 1016:20; 1031:8
 representative [9] 941:22; 944:16; 1000:14, 19; 1001:11; 1002:8, 9, 13
 represented [9] 932:5; 935:16; 939:16; 1006:7; 1007:18; 1040:22; 1043:14, 23; 1044:8
 representing [1] 1040:20
 represents [7] 929:8; 1001:23; 1010:3; 1017:3, 5; 1042:22; 1073:10
 request [1] 1035:15
 requested [3] 1035:10, 12, 16
 requesting [1] 964:11
 require [2] 1082:2; 1113:18
 required [2] 912:16; 975:7
 requirements [1] 915:20
 resale [1] 1004:5
 Research [4] 926:21; 951:1; 1033:15; 1034:3
 research [9] 920:18; 921:8, 18; 934:7; 966:9; 987:19; 988:2; 1000:9; 1002:12
 reserve [2] 995:25; 1076:24
 respect [6] 915:19; 960:9; 970:17; 972:13, 22; 997:12
 respects [1] 1016:3
 respond [4] 931:8; 939:4; 1056:11; 1066:16
 responded [1] 940:13
 respondent [33] 942:10; 955:21; 974:8; 1008:11; 1032:22; 1054:4, 9, 22, 24; 1063:25; 1064:11; 1073:18; 1075:16; 1078:10, 14; 1079:20, 24; 1080:4, 10; 1081:4; 1082:7, 8, 18, 19, 22; 1083:5, 13, 14; 1084:8, 12; 1085:19; 1093:3
 respondents [46] 934:17; 937:8, 13, 23; 940:12, 17, 23, 25; 969:21, 24, 25; 971:12; 990:24, 25; 992:19, 24; 997:16; 1011:14; 1027:9, 13; 1032:24; 1035:8, 10, 12, 15, 16, 18; 1036:1, 8, 16, 17, 24; 1037:14, 15, 18, 19; 1041:23; 1046:17; 1051:17, 20; 1054:8; 1057:7, 8, 10; 1058:2; 1060:2
 responding [3] 914:12; 974:9; 1056:7
 response [55] 913:19; 914:24; 915:25; 916:10, 16, 17; 917:17, 18; 924:22; 925:23; 930:6; 934:16; 938:9, 22; 940:8, 9; 941:20; 955:14, 24; 964:3, 7; 977:7; 989:20; 990:16; 991:3, 18, 21, 24; 992:2, 14; 995:9; 1001:4, 6; 1003:6, 13; 1018:17, 20; 1019:15; 1020:2, 6; 1024:19; 1026:21; 1027:1, 15, 21; 1028:7; 1029:16; 1056:8; 1057:14; 1058:4, 16; 1064:13; 1087:25; 1090:18; 1111:15
 responses [24] 934:3, 15; 939:15, 22; 941:16, 20; 949:10; 973:17, 21; 975:25; 990:3; 991:5; 1000:13; 1019:11; 1026:2, 3; 1027:4; 1029:18; 1033:7; 1058:2; 1060:9; 1087:19; 1090:19; 1094:17
 responsibilities [2] 1039:14, 16
 responsibility [3] 922:24; 927:10; 1072:24
 responsible [5] 942:8; 955:23; 1084:21; 1085:3, 5
 rest [2] 963:1; 989:25
 result [21] 926:17; 942:21; 944:5, 7; 977:13; 981:24; 983:21; 1010:1; 1011:22; 1013:11; 1014:2, 25; 1015:20; 1018:16; 1019:20, 23; 1020:23; 1025:7, 15, 16; 1033:3
 resulting [2] 928:4; 1018:16
 results [62] 912:19; 914:21; 915:1; 926:18, 23, 25; 927:13; 929:6, 11; 934:3, 24; 936:13, 14, 15; 938:3; 942:13, 16; 944:4; 945:25; 947:24, 25; 948:1; 951:6, 7, 8; 952:17, 19; 957:11; 959:12; 966:1, 3, 5, 8, 17, 19, 21; 970:6, 20, 25; 976:12, 13; 983:10; 985:8; 1000:19, 25; 1001:10; 1009:23; 1013:18; 1015:12; 1016:15; 1024:4; 1026:7; 1031:15, 25; 1032:6; 1033:13; 1034:2; 1059:15, 16; 1072:3; 1090:11; 1113:5
 resume [1] 993:17
 retained [2] 1010:18; 1033:25
 retaining [1] 980:25
 retransmission [1] 983:13
 return [2] 949:2; 1057:3
 returns [1] 1000:22
 revenue [4] 947:13, 15, 18; 986:12
 revenues [2] 921:21; 937:22
 review [5] 927:1; 1036:6; 1097:8, 10; 1110:9
 reviewed [7] 923:5, 8; 1036:15; 1050:2, 18; 1058:11; 1071:24
 reviewing [3] 921:1; 1037:10; 1042:3
 revised [1] 1031:24
 revisit [1] 914:10
 revolves [1] 921:1
 RF [1] 1063:10
 Richard [1] 1040:2
 Rick [1] 1010:11
 riding [1] 953:16
 Right [11] 918:18; 972:21; 1011:24; 1013:16; 1022:9; 1029:15; 1072:9; 1088:20; 1096:25; 1109:21; 1110:25
 right [88] 910:16, 20, 25; 913:19; 914:6, 11; 916:11; 919:6; 920:1; 925:15; 933:23; 941:11; 948:20; 961:17; 962:20; 963:7; 965:7; 969:10; 970:2; 975:7, 19; 990:16; 991:12, 13; 993:8; 999:1; 1002:21; 1003:23; 1007:22; 1011:20; 1012:3, 8; 1013:10; 1014:1, 7, 12; 1015:1; 1018:24; 1022:4; 1026:19; 1027:19; 1028:21; 1029:8; 1037:25; 1043:1, 23; 1044:9; 1045:13; 1048:22, 25; 1050:5, 10; 1056:21; 1058:18; 1059:24; 1063:14, 21; 1068:18; 1069:21; 1070:4, 5, 10, 16; 1073:21; 1078:21; 1079:2, 7, 13, 20; 1080:12, 25; 1081:4, 12; 1082:8; 1083:9; 1086:9, 14, 24; 1089:24; 1090:2; 1091:10; 1096:15; 1098:24; 1101:7; 1109:20; 1110:11, 24; 1114:4
 right-hand [3] 975:5; 1062:15; 1088:16
 RNA [3] 1078:14; 1080:2; 1081:4
 role [2] 923:3; 1052:21
 Roman [2] 927:24; 965:8
 roman [5] 927:22; 930:13; 961:21; 964:23; 965:11
 room [2] 1060:21; 1069:18
 root [1] 946:17
 roughly [4] 923:25; 953:16; 954:10; 992:6
 rounds [1] 1087:14
 row [1] 1067:6
 royalties [33] 918:5; 940:21; 945:22; 977:8, 14, 20; 1032:1, 7, 20; 1033:8; 1046:16, 22, 23; 1047:2; 1066:6; 1091:25; 1092:5, 23; 1094:9; 1098:15, 18; 1100:2; 1101:18, 20; 1103:11, 14; 1105:5; 1107:17, 20; 1108:24, 25; 1110:14
 Royalty [1] 941:25
 royalty [40] 915:6; 918:1; 946:14; 949:5; 977:6, 7; 1032:9, 18, 23, 25; 1047:12; 1053:3, 9, 17; 1055:23; 1056:3, 5, 9, 24; 1059:18; 1060:2, 9; 1062:21; 1063:3; 1065:7; 1069:12; 1087:20; 1092:19; 1094:17; 1099:16; 1100:9, 11, 24; 1102:3, 15; 1103:17; 1105:14; 1107:4; 1109:4, 6
 Rule [1] 915:20
 rule [1] 946:17
 ruled [1] 919:11
 rules [6] 915:21; 999:16, 19; 1000:2; 1094:9; 1112:17
 ruling [3] 918:20; 1076:24; 1113:18
 rulings [1] 919:14
 run [2] 916:12; 990:19
 runs [2] 969:10; 1113:9

S

S-E-S-S-I-O-N [1] 994:1
 sake [1] 1044:25
 sample [51] 939:20, 24; 940:1, 6, 8, 12, 13; 941:15, 19, 21; 945:17, 20, 23; 946:2, 4; 947:20, 23; 948:2, 12, 13, 19; 949:19, 21; 951:4, 25; 952:12; 953:1; 977:19; 1000:10, 12, 13, 15, 18; 1001:9, 15, 24; 1009:23; 1021:11, 15; 1027:24; 1031:13; 1032:5, 9; 1033:10; 1037:17; 1042:17; 1044:1, 18
 sampled [4] 941:15; 953:4; 976:19, 24
 samples [6] 941:14; 947:5; 954:6; 966:16; 985:2; 1034:6
 sampling [3] 976:20, 23; 1002:8
 satellite [2] 922:13; 1057:4
 satisfaction [3] 981:2; 1005:1
 satisfy [4] 911:24; 912:2, 3, 4
 SATTERFIELD [11] 994:17, 20; 995:4, 22; 1108:9; 1109:11, 16, 21, 25; 1110:3; 1112:3
 Satterfield [5] 994:17, 20; 995:20; 1108:10, 12
 Saturday [1] 1039:1
 saying [24] 915:10; 916:6; 948:7; 1011:17; 1014:14; 1017:5; 1020:17; 1026:2, 8, 11; 1029:10; 1030:17; 1032:12; 1048:17; 1063:13; 1064:10; 1095:10, 19; 1098:6; 1099:25; 1102:6,

11; 1103:2, 16
scale [1] 1110:13
schedule [10] 1006:24; 1049:3, 8, 12,
13, 19, 22, 25; 1050:10; 1051:23
scheduled [1] 1051:24
scratch [1] 910:7
seated [1] 920:8
Second [1] 916:21
second [32] 915:14; 929:21; 977:4;
983:11; 1017:7; 1035:5; 1037:5;
1045:17; 1047:1, 9, 11; 1048:24;
1049:20; 1053:16; 1068:25; 1072:5;
1073:21; 1074:5; 1075:13; 1078:24;
1079:6; 1086:18, 25; 1097:1, 5, 14, 19,
25; 1099:11; 1110:9; 1111:5
secret [1] 1081:6
secretary [1] 1083:15
Section [2] 911:25; 912:14
section [4] 925:11, 16; 1035:5; 1045:17
secure [1] 983:16
seek [1] 1004:9
seeks [1] 1003:22
select [5] 966:15; 985:24; 1000:13;
1001:23; 1004:5
selected [7] 953:1; 970:17; 1001:9;
1042:16; 1044:18, 19; 1111:18
selecting [3] 985:2; 1000:10, 11
selections [1] 985:21
selectively [1] 988:1
selling [1] 947:16
Senior [1] 920:15
sense [1] 913:13
sensibility [1] 1040:8
sentence [4] 1035:20, 23; 1050:6, 8
separate [3] 935:16; 986:10; 1103:21
separated [1] 945:12
separately [1] 973:4
sequence [6] 1049:14, 16, 17; 1061:23;
1086:12, 15
series [15] 918:6; 935:2, 14; 953:15;
954:22, 24, 25; 955:4; 967:20; 1000:6;
1007:2; 1008:25; 1058:9; 1075:1;
1086:6
serve [1] 1114:2
Service [1] 922:8
service [3] 937:16, 19; 988:8
services [6] 936:25; 937:14, 21;
986:14; 988:3; 1004:1
serving [1] 984:17
setting [1] 1030:7
settlement [1] 972:10
seven [2] 917:7; 953:2
seventh [1] 1082:11
severe [1] 1014:11
shape [1] 1028:18
shaped [1] 1021:21
share [2] 1093:20; 1100:11
sheet [5] 1077:17; 1078:20; 1079:1;
1081:18; 1082:1
sheets [6] 1046:8, 13; 1047:22, 25;
1048:5; 1082:2
show [9] 928:21; 934:24; 967:21;
1014:1; 1021:25; 1058:22; 1093:7, 9;
1109:22
showing [1] 983:15
shows [12] 928:6; 935:2; 953:15;
965:3; 975:21; 990:15; 1006:12; 1058:9,
20, 23; 1088:12; 1090:5
shrinks [3] 1020:4, 5
Sieber [1] 1114:1
sight [1] 956:22

signal [99] 936:22; 937:6, 9; 943:1;
967:24; 969:20; 970:10; 971:15; 972:1;
973:22; 974:14; 977:24; 978:7, 9;
979:22; 980:1, 7, 16; 981:22; 983:9, 12,
13, 17, 19; 984:4, 7, 21, 25; 985:5;
987:4, 5; 988:23; 989:9; 990:5, 7, 10,
11; 992:8; 995:1,
8; 997:9; 1004:19; 1005:10; 1006:13;
1007:5, 11, 12; 1009:18; 1035:24;
1036:25; 1041:24; 1043:11; 1049:9;
1052:7; 1055:3, 19; 1061:9, 13; 1062:20;
1063:1, 12, 14; 1064:11; 1065:8; 1078:4;
1086:3; 1089:20; 1090:16; 1092:2;
1093:6; 1095:17; 1096:4; 1097:8, 10,
18, 19, 23, 24; 1098:1, 2, 10, 12; 1099:3,
9, 11; 1100:17, 18; 1101:2, 3, 5, 9, 12, 23;
1103:23; 1107:15
signals [73] 969:23; 971:8, 19, 20;
978:22; 979:14, 17, 20; 980:3, 8; 982:9,
22; 983:4; 984:9, 20; 985:10; 987:11;
994:24; 995:6; 997:10, 20, 25; 998:6;
1000:2, 17; 1008:20; 1009:6; 1035:9,
11, 15, 16; 1036:2, 13; 1037:12;
1049:20; 1051:16,
22; 1052:4; 1055:22, 24; 1056:13, 16, 24;
1061:12; 1066:12, 24; 1086:22; 1091:8;
1092:1, 6, 15, 21; 1093:5; 1094:7; 1095:5,
20, 21, 22; 1098:3, 7, 20; 1099:7, 8, 14,
23; 1103:7, 8; 1107:17; 1111:18; 1112:1
significance [1] 974:17
significant [3] 949:24; 1104:15, 25
significantly [1] 983:4
signs [5] 1088:13, 22; 1089:6, 21;
1091:17
silence [1] 1113:20
simple [13] 941:15; 945:16, 23; 946:2;
948:2; 1001:14; 1067:2, 9, 22; 1068:10;
1095:1; 1096:2
single [3] 913:6; 986:9; 1064:17
sir [4] 919:3; 920:12; 1002:22; 1096:12
sit [1] 1088:21
sitting [1] 1066:21
situation [11] 979:10; 980:1; 981:7;
982:17, 24; 1005:7, 8; 1051:9; 1063:18,
24; 1064:19
situations [1] 1009:11
six [9] 927:22, 24; 930:13; 949:7;
961:21; 964:23; 965:8, 11; 987:22
size [6] 931:12; 933:12; 940:12; 967:12;
1027:25; 1030:2
skills [1] 1006:1
sliding [1] 1110:13
slight [4] 935:11; 944:4, 6; 966:22
slightly [8] 935:5; 949:23, 25; 950:1;
951:18; 953:18; 1066:3; 1067:5
slope [1] 1014:10
smaller [4] 915:5; 939:23; 996:13
sole [1] 915:24
somebody [7] 1034:11; 1038:6; 1040:7,
9; 1073:5; 1080:7
somehow [2] 1032:13; 1056:9
Someone [1] 988:8
someone [10] 944:17; 986:20; 989:22;
996:22; 1008:18; 1042:2; 1043:22;
1062:2, 3; 1085:8
someplace [1] 1097:13
somewhat [7] 939:11; 940:9; 944:2;
966:16; 979:25; 982:23; 1014:11
somewhere [5] 943:19, 25; 1022:13;
1028:16; 1041:22
Sorry [2] 1014:21; 1021:6

sorry [24] 918:22; 922:17; 926:17;
946:24; 960:3; 965:1; 967:4; 968:10;
983:12; 1004:8; 1023:22; 1025:10;
1031:22; 1037:21; 1038:16; 1043:10;
1050:7; 1065:16; 1068:14; 1079:18;
1084:5; 1086:21, 22; 1106:22
sort [8] 911:2; 912:20; 932:21; 1011:19;
1024:7; 1038:1; 1041:3; 1081:6
sorts [1] 986:21
sought [1] 941:12
sound [1] 991:11
sounds [4] 991:13; 1106:12, 13
source [1] 1074:13
span [1] 966:13
speak [1] 955:22
speaking [3] 915:10; 918:16; 992:6
specializing [1] 920:17
specials [1] 1058:10
specific [11] 949:4; 969:22; 971:14, 21;
979:9; 1051:10; 1052:3; 1072:14;
1081:18; 1083:1; 1104:23
specifically [21] 924:25; 936:21; 953:2;
955:18; 966:5; 997:15; 1012:19;
1019:13; 1026:25; 1030:22; 1036:10,
14; 1039:11, 18; 1049:22; 1051:4;
1056:6; 1075:24; 1090:21; 1100:20;
1103:17
specified [1] 1094:8
spend [1] 989:24
sponsor [2] 1065:12, 23
sponsored [7] 910:8; 941:4, 5, 7;
958:25; 1011:7; 1105:10
sponsoring [6] 1011:6; 1065:5, 21;
1066:10, 13; 1069:13
sponsors [1] 994:14
sponsorship [1] 934:8
Sports [17] 910:5, 8, 16, 17; 911:13;
915:17, 25; 916:21; 919:15, 23; 932:10,
13; 934:9; 941:7; 996:13; 998:15;
1033:25
sports [57] 915:7; 916:6; 917:8, 12;
928:5; 934:25; 942:17, 19; 943:3, 8, 13;
944:18; 948:11, 12, 14, 20; 949:20, 22;
951:13; 953:11; 957:13, 14; 958:7;
959:17; 960:1; 963:9, 12, 19, 23; 964:1,
4; 966:6; 967:25; 968:6, 11; 969:8;
974:10; 975:1;
984:10; 988:24; 989:10, 16; 1006:12;
1007:1; 1008:13, 24; 1012:14; 1022:18,
23; 1026:8, 16; 1027:4, 11, 13; 1049:2;
1058:9; 1102:1
square [1] 946:17
stand [7] 912:17; 920:1, 5; 1011:12, 13;
1071:8; 1113:13
standard [6] 912:15, 18; 1002:23;
1003:1, 5, 16
standardized [1] 1073:12
standpoint [1] 911:17
stands [1] 962:20
start [9] 910:7, 15; 911:23; 933:21;
950:23; 953:22; 985:25; 1048:21;
1071:6
started [2] 1046:11; 1079:6
starting [2] 1085:8; 1110:19
starts [1] 1078:25
state [11] 920:11; 922:4; 945:19;
995:23; 1028:3, 4; 1061:2; 1074:22;
1075:15; 1093:21; 1099:2
stated [2] 995:22; 1106:7
statement [10] 914:7; 1047:18; 1048:7,
10, 13; 1069:6; 1099:21; 1111:19;

1112:20; 1114:3
 statements [5] 930:24; 1043:6;
 1073:25; 1085:12; 1097:7
 States [2] 939:17; 1074:17
 states [1] 1094:18
 station [33] 979:13; 980:5, 10; 982:4;
 984:13; 989:5; 1006:4, 5, 9, 17;
 1007:16; 1059:21; 1063:19; 1064:1, 5,
 7, 19; 1089:7, 8, 13, 22; 1090:22, 24,
 25; 1092:23; 1095:24; 1102:4, 17;
 1107:11, 20, 24
 station-produced [1] 1008:20
 Stations [1] 1110:21
 stations [15] 943:1; 955:2; 982:1;
 983:1; 984:3; 1006:8; 1007:22; 1037:8;
 1059:18; 1086:18; 1091:5; 1102:19;
 1105:2; 1107:25; 1110:22
 statistical [4] 913:6; 916:19; 1001:8;
 1003:3
 statistically [6] 941:22; 949:24;
 1000:12; 1002:7, 9, 13
 statistician [1] 1019:6
 stay [1] 1077:22
 step [1] 1103:19
 Stern [1] 1041:2
 STEWART [19] 997:1, 5; 1003:20;
 1005:23; 1010:5; 1065:25; 1066:2;
 1068:1, 22; 1077:1; 1104:14, 25;
 1105:9, 13, 23; 1106:19; 1107:1;
 1108:5, 22
 Stewart [8] 956:20; 996:25; 997:2;
 1010:8; 1013:5; 1068:21; 1069:10;
 1104:13
 stick [1] 1073:6
 sticking [1] 1034:24
 straight [2] 914:2; 1021:10
 strata [22] 915:4; 916:2; 917:11;
 940:17, 24; 945:25; 946:22; 949:10;
 976:14, 17, 18, 24; 977:3, 9, 13, 16, 19;
 1032:7, 18; 1033:2
 strategic [1] 920:18
 Strategies [1] 922:7
 stratification [13] 914:17, 18; 915:2;
 916:11; 917:25; 945:7; 946:13, 16;
 947:9; 948:24, 25; 949:2, 3
 stratified [12] 941:21; 945:17, 19;
 946:4, 7; 947:5, 20; 948:13; 949:19;
 951:25; 953:1; 1001:15
 stratify [3] 915:1; 946:9; 947:22
 Stratum [7] 1033:3, 4; 1034:13, 14, 17
 strengths [1] 922:11
 stricken [1] 918:21
 strike [3] 912:9; 919:5; 955:14
 stronger [1] 954:18
 structured [1] 985:4
 studies [41] 916:18; 922:24; 923:5, 9;
 924:11, 13; 925:12; 926:18, 24; 927:1,
 9; 929:12, 15; 934:9; 936:1, 3, 11, 13;
 938:8; 947:10, 11; 951:24; 953:8, 12;
 958:23; 968:3; 969:12, 21; 970:4, 14;
 973:18; 997:7; 998:4, 15; 999:8;
 1001:19; 1044:11;
 1052:23, 25; 1053:1
 study [99] 916:20; 922:22; 923:2, 4, 24;
 924:2, 5, 25; 925:5, 15, 16, 24; 926:19,
 20; 927:11; 928:3; 934:19, 22, 23;
 936:6, 15, 16, 19; 937:9; 939:8, 9, 19;
 941:21, 23; 944:14; 945:16, 25; 947:1,
 17; 948:2, 8, 9, 16; 949:1, 8; 950:10, 13,
 17, 18, 21; 951:1, 3, 4, 6; 952:1, 12;
 953:3, 22, 24; 955:18; 957:10; 959:4, 6;

967:18; 970:17; 971:9; 972:6, 9; 973:24;
 997:13, 15, 19; 998:24; 999:3, 9; 1001:12;
 1002:16; 1009:15; 1024:1, 3; 1025:7;
 1034:24; 1041:24; 1042:15, 17; 1045:16;
 1048:22; 1050:20;
 1052:21, 22; 1054:7; 1061:24; 1072:2;
 1108:24, 25; 1112:23; 1113:5, 17
 Subject [1] 995:22
 subject [1] 1103:11
 submit [4] 961:20, 21; 964:22, 23
 submitted [8] 917:18; 922:2, 22; 923:1,
 6; 925:21; 967:22; 994:13
 subparagraph [1] 913:4
 subscriber [10] 947:14, 18; 981:1;
 984:1, 19; 986:16; 987:14, 20; 988:4;
 1101:8
 subscribers [22] 939:14, 17; 980:25;
 981:11, 13, 21; 984:17, 21; 985:10;
 986:8, 19; 987:25; 1003:22; 1004:2, 7,
 16, 22, 25; 1005:3, 6; 1009:6; 1075:15
 subsection [1] 916:18
 subsequent [2] 928:19; 1012:8
 subset [1] 940:24
 substance [2] 961:8, 9
 substantially [8] 939:5; 950:2; 966:16;
 1020:25; 1047:10; 1049:3; 1064:4;
 1107:6
 substitute [2] 910:11; 1024:22
 substituting [1] 1024:15
 subtraction [1] 992:5
 successful [2] 1038:14; 1040:19
 suggest [5] 914:19; 1027:12, 14;
 1081:10; 1113:20
 suggested [3] 952:14; 1038:5; 1041:1
 suggesting [6] 917:19; 940:18; 987:2;
 1094:23; 1107:14, 21
 suggestion [4] 932:15; 1059:10, 11, 14
 suggests [1] 1024:9
 sum [11] 915:21; 922:2, 19; 933:21;
 934:1, 4; 936:20; 937:7; 967:21; 975:24;
 1019:6
 Summarize [1] 967:17
 summarize [1] 950:11
 summarizing [1] 1016:14
 summary [5] 927:22; 959:9; 960:13;
 965:3; 1016:12
 super [2] 942:25; 979:12
 superstation [1] 1063:19
 supervise [1] 1042:10
 supervised [2] 1076:2; 1077:13
 supervisor [1] 1083:3
 Suppliers [7] 910:23; 1064:23; 1071:7;
 1076:5; 1088:12; 1109:12
 support [1] 989:4
 supporting [1] 914:14
 supposed [6] 926:6; 1053:17, 21;
 1055:4; 1078:18; 1112:24
 surmised [1] 1063:17
 surprise [2] 1027:2, 3
 surprised [1] 1041:3
 surprising [1] 940:2
 surrounding [1] 952:7
 Survey [1] 1060:9
 survey [179] 915:18, 22, 23; 927:20;
 934:14; 935:15, 24, 25; 936:15, 20;
 940:16, 20, 22, 23, 24, 25; 941:4, 5, 6,
 14, 18; 942:3; 944:2, 8; 945:2, 9, 13;
 946:8; 948:22, 23; 950:5, 23, 24, 25;
 952:16, 18, 20, 21, 23, 25; 955:10, 11;
 957:6, 7,
 8, 9; 958:2, 4, 17, 18, 21, 22; 960:11;

965:17, 20, 22; 966:11; 967:8, 9; 969:20;
 970:7; 972:13, 16; 973:19, 20; 975:18;
 978:19; 980:23; 984:16, 17; 985:3;
 987:15; 989:15; 990:8, 24; 991:6; 992:3,
 8, 19, 24; 995:16; 998:18; 1000:9, 25;
 1001:10; 1002:12; 1011:5,
 19, 20; 1012:3, 6, 7, 12, 20, 24; 1013:17;
 1014:2, 6; 1017:22; 1018:23; 1021:11;
 1022:20; 1024:9; 1026:3, 9; 1028:6;
 1029:16; 1031:14, 15; 1032:1; 1033:13,
 14, 20; 1034:1, 2, 5, 7; 1035:10, 14;
 1036:16, 22; 1042:10; 1043:19, 21;
 1044:17; 1045:17, 18, 19, 23;
 1046:3, 11; 1049:1, 7; 1050:4, 12, 14, 16;
 1051:5; 1052:15; 1053:13; 1057:12, 13;
 1058:2, 8; 1062:1; 1071:15, 21, 23, 24;
 1072:22; 1073:13; 1075:20, 24; 1076:1, 7;
 1082:1, 2; 1086:11; 1087:2, 19; 1089:18,
 20; 1094:16; 1095:13, 15, 18; 1100:5;
 1103:21; 1111:22
 surveyed [5] 939:20; 1001:4; 1017:1;
 1020:1; 1033:10
 surveyors [1] 1081:6
 surveys [53] 922:2, 20; 923:22; 933:21;
 934:1, 5, 6, 10; 935:21; 941:2, 10, 12,
 13, 14; 942:5, 14; 943:17; 948:5, 6;
 950:23; 954:6, 9; 957:24; 967:18, 21;
 969:13, 17; 971:5, 17; 981:2; 998:8, 9;
 1002:12; 1005:1, 2, 17; 1007:10;
 1010:20; 1011:2;
 1020:25; 1021:4; 1024:2; 1036:15;
 1046:3, 5; 1050:9; 1052:16; 1060:21;
 1072:1, 17; 1086:24
 sustained [1] 918:11
 sworn [3] 920:5; 1112:14, 18
 Syndicated [1] 928:6
 syndicated [32] 935:2; 943:18, 24;
 950:5; 951:20; 953:15, 23; 954:13, 14,
 18, 25; 955:7; 959:18; 960:5; 963:10,
 13, 20, 24; 964:1, 5; 974:11; 975:2;
 999:15, 18; 1000:1, 3, 6; 1006:12;
 1007:2; 1008:13, 24; 1058:9
 syndications [1] 984:11
 System [1] 974:25
 system [71] 920:24; 921:10; 922:6;
 934:10, 14; 938:19, 20, 21; 939:10, 18,
 21, 24; 940:13; 942:4, 6, 7, 11; 969:15,
 16; 970:9; 973:16, 21; 976:15, 21, 25;
 977:6; 978:12, 20; 979:12, 24; 984:2;
 988:22; 989:1; 994:25; 995:8; 1001:4;
 1034:13;
 1059:21; 1062:22; 1063:3; 1073:17, 18;
 1074:4, 17, 24, 25; 1075:2, 3, 4, 5, 6, 9,
 11, 14; 1084:10, 16, 22; 1085:4; 1088:17;
 1090:15, 23; 1091:8, 12; 1096:1; 1097:22,
 25; 1098:2; 1109:3
 systematic [1] 1009:25
 systems [74] 941:16, 19, 23; 942:2;
 947:15, 16, 18; 953:4; 969:14; 971:8, 7,
 18, 25; 972:2; 973:22; 974:18; 976:1, 4,
 15, 19, 24; 977:3, 15, 16, 18, 21; 979:3,
 9; 981:9, 11; 983:15; 985:8; 987:18;
 990:15; 991:17, 20, 24; 992:2, 7, 10;
 1001:6;
 1002:1; 1009:19; 1021:12; 1032:2, 7, 20;
 1033:8, 10; 1034:6; 1042:15, 18, 23;
 1043:4, 6, 12, 23; 1044:1, 8, 12, 13, 15;
 1057:12; 1060:10; 1065:7; 1074:21;
 1086:19, 22; 1092:1; 1098:19; 1099:13;
 1108:25; 1111:2

T

Table [18] 928:2; 929:7, 8; 932:1; 933:25; 960:22; 964:12; 969:5, 11; 1010:15, 16; 1015:12, 18; 1022:18; 1023:14; 1025:12, 18; 1059:2
table [16] 927:22; 959:9, 10, 22, 23; 960:13, 24; 965:4; 979:8; 1011:9; 1013:15; 1016:14; 1023:16; 1059:11; 1063:24; 1100:20
tables [1] 1031:1
tabular [1] 935:7
tabulate [4] 1031:16; 1032:6; 1034:1; 1072:3
tabulated [3] 1031:14; 1032:1; 1033:13
tabulation [5] 927:13; 1031:6; 1032:21; 1034:15, 18
tabulations [2] 928:3; 1044:12
taint [1] 1040:9
takes [1] 913:16
talk [5] 936:12; 946:7; 950:8, 22; 1034:25
talked [4] 1038:3, 5; 1039:3; 1113:6
talking [15] 930:14; 943:9; 961:8; 969:6; 981:9, 10; 986:24; 1037:5; 1039:9, 18; 1094:19; 1096:22; 1099:20, 22
task [1] 1053:2
tastes [1] 1004:21
TBS [3] 1090:1; 1104:1, 5
technically [1] 1028:8
technologies [1] 922:14
technology [3] 985:17, 20, 24
telephone [4] 922:14; 1074:6, 10; 1075:1
telephoned [1] 1074:1
Television [5] 969:2; 994:10; 1074:13, 14; 1088:10
television [20] 920:17; 980:10, 16, 19; 981:12; 982:9; 983:12, 16, 19; 1004:10; 1006:5, 10; 1007:13; 1089:7, 13, 20, 22; 1090:24; 1091:4; 1093:3
telling [5] 1018:10; 1027:17, 18, 20; 1047:15
tells [2] 1073:24; 1110:6
Ten [1] 1041:13
ten [3] 966:12; 985:19; 987:3
tend [6] 929:24; 946:3; 971:25; 981:18; 987:25; 988:1
term [3] 981:3; 1002:23; 1029:24
termed [1] 1062:4
terms [25] 921:20; 927:11; 930:5; 935:5, 13; 937:20; 938:22; 943:21; 953:6; 957:11; 975:15; 977:1; 1029:13; 1031:10, 23; 1051:10; 1054:4, 9; 1055:8; 1056:21; 1069:24; 1099:5; 1103:3, 14, 19
terribly [2] 933:5; 940:8
test [1] 949:23
testified [2] 920:6; 1030:5
testifying [3] 926:16; 1052:13; 1110:12
testimony [41] 912:11; 913:12; 914:7, 14; 918:15, 17; 919:6, 10; 924:18, 21, 24; 925:4; 926:3, 23; 930:9, 13; 931:5, 11; 932:25; 955:17; 960:20; 983:9; 989:13; 991:8, 15; 1012:18; 1015:14, 19; 1025:13; 1035:24; 1045:6; 1048:20, 21; 1050:5; 1052:19, 21; 1067:14; 1102:2; 1111:14; 1112:2; 1114:1
text [1] 969:5

Thank [30] 913:23; 917:15; 918:13; 920:7; 923:18; 947:7; 983:24; 993:4; 997:1; 1010:6, 7, 24; 1011:16; 1014:18; 1024:11; 1025:23; 1041:13, 19; 1060:14; 1070:23; 1082:4; 1087:9; 1088:5; 1091:19; 1094:13; 1104:8; 1108:5, 6; 1112:5, 7
thatwhat [1] 1049:14
Theoretically [1] 1052:10
they're [12] 952:18; 954:2; 985:11, 13; 1009:24; 1056:20; 1066:20; 1067:17; 1084:17; 1097:24; 1098:18; 1112:23
they've [4] 916:24; 987:24; 1056:23; 1074:20
thinking [4] 1007:14; 1028:2; 1056:13, 20
third [9] 934:13; 973:24; 1008:10; 1068:25; 1069:1, 8; 1097:25; 1100:1; 1111:5
thirdly [1] 930:2
three [24] 913:13, 16; 914:12; 917:11; 924:3; 929:13; 940:10; 965:6; 969:12; 980:3; 986:10; 990:19, 21; 1005:25; 1017:24; 1067:24; 1068:15; 1081:11, 12; 1088:10; 1091:4, 24; 1093:5; 1095:8
three-fourths [2] 1027:9, 12
times [4] 1027:25; 1067:24; 1083:6; 1093:5
timing [1] 999:8
Timothy [3] 969:1; 1065:20; 1088:9
title [1] 1072:8
tool [1] 947:9
total [28] 956:18; 975:5; 977:2, 8; 978:8; 990:24; 991:5, 20; 1032:1; 1055:2, 5, 6, 18, 21; 1062:20; 1065:9; 1066:8; 1091:25; 1095:16; 1096:4; 1098:15, 18, 23; 1099:19; 1102:15; 1107:16; 1109:3, 6
totalled [1] 975:8
totally [1] 912:19
totals [1] 1032:25
touch [1] 1075:8
touched [1] 987:16
tracking [1] 980:25
training [1] 1072:25
transcripts [1] 924:17
translated [1] 983:5
translates [1] 1085:22
TRAUTMAN [1] 920:3
Trautman [56] 919:9, 10, 24, 25; 920:13, 14; 922:16; 923:16, 21; 927:17; 929:3; 933:19; 939:7; 944:25; 949:18; 957:5; 958:6; 964:8, 17; 965:15, 24; 966:22; 968:18, 24; 973:6, 7; 994:8, 11; 997:2; 1010:10; 1025:5, 13, 21; 1026:1; 1038:1; 1060:20; 1061:7; 1065:22; 1066:19; 1067:13; 1068:13; 1071:8, 16, 25; 1076:19; 1080:25; 1088:9; 1104:12; 1105:8, 20, 23; 1106:7; 1107:2; 1108:7; 1112:6, 7
travel [1] 988:9
traveler [1] 988:7
treated [1] 1098:13
trend [2] 1058:20, 23
trends [1] 942:22
triangle [1] 1025:8
Tribunal [7] 926:1, 13; 942:24; 945:5, 6; 949:14; 956:1
tribunal [3] 1012:13, 18; 1053:2
tricky [1] 935:14
tries [1] 1082:24

triple [3] 1080:11; 1081:5, 13
true [3] 996:23; 1009:8; 1026:15
Turning [1] 958:16
turning [3] 929:3; 1053:12; 1074:5
turns [2] 953:18; 996:24
TV [1] 1084:14
Twenty-four [1] 1011:24
type [10] 937:16; 971:14; 979:5, 6, 22; 989:15; 1036:17; 1053:25; 1061:13; 1075:5
types [6] 921:21; 955:3; 1009:21; 1049:12; 1052:8; 1085:18
typically [3] 955:1; 981:12; 987:20

U

Uh-huh [1] 1022:2
ultimate [1] 1009:20
ultimately [3] 1082:8; 1083:4, 7
unable [2] 912:21; 1043:5
unbiased [1] 1056:11
unchanged [12] 928:7, 9; 960:7; 963:10, 11, 14, 20, 22, 25; 964:3, 6
uncommon [1] 1002:11
underlies [1] 1114:1
underlying [5] 913:14; 928:13; 1031:5; 1095:10; 1112:22
underneath [4] 915:3; 916:3; 1019:7, 10
understand [21] 927:18; 987:18; 996:23; 1025:11; 1027:16; 1029:9; 1032:12; 1039:4; 1052:11, 24; 1053:24; 1060:20; 1061:6, 14, 15; 1067:12; 1079:16; 1091:22; 1102:5, 8, 9
understanding [17] 958:9, 13; 961:25; 1011:7; 1022:3, 20; 1034:18; 1043:5; 1049:21; 1059:25; 1078:4; 1094:25; 1096:5, 19, 24; 1107:9, 21
understood [3] 917:17; 1067:1; 1094:15
unfairly [1] 988:20
unfamiliar [1] 1095:12
unfinished [1] 956:6
unique [2] 981:17; 1003:23
United [2] 939:17; 1074:17
universe [42] 942:1; 945:22; 947:10, 14, 18; 977:2, 15, 21; 1001:4, 11, 16, 21, 24; 1002:4, 17, 20; 1009:22; 1010:1, 3; 1017:2, 23; 1019:20; 1020:2; 1021:12, 17; 1022:12, 24; 1031:5, 8; 1032:2, 3, 4, 17; 1033:1, 7; 1034:22; 1042:16; 1043:14, 23; 1044:8, 18
University [1] 923:13
Unlike [1] 1059:23
unsure [1] 1089:9
unsurpassed [1] 1027:11
untrained [1] 917:6
unusual [2] 989:20; 1083:18
unweighted [7] 975:11, 18, 21, 23; 976:3, 6, 7
upward [1] 953:18
USA [1] 955:5
useable [1] 939:15
useful [1] 1002:14
usual [1] 956:5
utilized [6] 941:21; 945:14; 951:1, 24; 957:10; 1043:25

V

valid [5] 912:23; 945:20, 21; 1000:12; 1101:15

valuable [7] 935:1; 988:8; 1005:11, 12;
1008:21; 1091:1; 1101:12
valuation [3] 1000:6; 1007:9; 1111:16
valuations [5] 997:9, 19; 1109:2, 5;
1111:15
value [107] 921:12; 934:3, 18; 936:17,
18; 937:25; 957:14; 967:24; 968:6, 7,
11, 13; 969:18, 25; 970:3, 9, 22; 971:12,
13, 20; 972:1, 3; 974:9, 13; 975:1;
976:3; 977:18; 978:8, 21; 979:5, 21;
980:18, 24; 981:4, 12, 21, 24; 984:23;
988:10;
989:2, 9, 17; 990:6, 9, 12; 992:12, 15, 20,
25; 993:1; 995:6; 1003:12; 1004:17;
1005:7; 1007:13; 1008:12; 1016:22;
1017:1; 1027:10, 13; 1049:13, 18, 20;
1051:6, 7, 9, 20; 1054:10, 14, 17; 1055:2,
5, 6, 11, 18, 20, 21, 22; 1062:15, 19, 20;
1063:7; 1064:9, 12,
21; 1067:4, 6, 21; 1070:2; 1088:15;
1089:18; 1090:8; 1091:6; 1093:2;
1094:10; 1098:23; 1099:16, 22; 1100:17;
1101:2; 1102:3, 12; 1111:25
valued [6] 981:19; 1061:13, 17; 1063:1,
25; 1064:20
values [8] 930:3; 934:16; 975:8;
1007:20; 1008:1; 1009:21; 1061:1;
1104:1
valuing [2] 921:4; 1060:4
variable [1] 946:14
variance [2] 938:5; 1003:3
variation [9] 916:4; 917:6, 10, 14;
953:25; 1091:15; 1100:16, 20; 1105:1
variations [3] 1002:3; 1009:17; 1105:24
variety [3] 988:6; 1004:2; 1009:13
vary [2] 1064:4; 1090:19
varying [1] 1004:21
vast [1] 982:2
Veerhusen [1] 1038:11
venture [3] 922:8; 971:6; 989:3
verify [5] 913:10; 1065:4; 1066:23;
1070:8; 1113:5
verifying [1] 1069:24
versa [1] 1033:4
version [2] 910:11; 933:12
versus [2] 994:25; 995:7
VI [1] 1010:15
vi [1] 967:2
via [2] 983:13, 16
Vice [1] 920:15
vice [1] 1033:4
view [6] 966:9; 986:19; 1004:20;
1059:16; 1070:12; 1090:13
viewers [1] 981:9
viewing [1] 981:14
views [1] 987:14
Virginia [1] 1002:2
Virtually [1] 955:12
virtually [1] 952:24
vis-a-vis [1] 998:24
VOIR [1] 923:19
voir [1] 923:16

W

wait [2] 956:3; 1076:24
waiting [1] 996:20
wanted [21] 915:9, 14, 15; 928:14;
969:9; 973:5; 978:16; 990:19, 22;
999:13; 1040:6; 1054:7, 9, 23; 1056:11;
1087:14, 23; 1088:10; 1090:3; 1109:22;
1112:19

wants [3] 916:12, 13; 986:16
watch [3] 987:25; 988:1, 3
watches [1] 987:20
ways [1] 1051:14
we'd [5] 956:4, 12; 960:17; 985:25;
1070:7
We'll [8] 928:23; 957:4; 960:20; 967:14;
993:16, 17; 1039:25; 1072:9
we'll [3] 956:5; 965:10; 1070:18
We're [5] 915:17; 931:12; 996:22;
1094:18; 1098:6
we're [15] 928:16; 931:16; 933:8;
962:6; 982:16; 984:16; 989:21; 996:20;
1000:16; 1040:7; 1071:3; 1098:5;
1113:14, 21
we've [6] 928:12; 932:24; 940:15;
954:10; 968:19; 973:1
weakness [1] 1103:12
weaknesses [1] 922:11
weather [3] 988:8, 10
weekend [3] 1070:8; 1113:9; 1114:5
weight [14] 915:1; 926:13; 943:4;
945:5; 956:1; 976:16, 20, 25; 977:7, 18,
25; 980:4; 984:24; 1106:14
weighted [4] 912:18; 940:21; 976:2, 22
weighting [11] 914:17; 941:25; 945:1,
4; 976:8, 9; 977:4, 17; 978:7, 17; 1109:9
weights [1] 976:11
weren't [1] 1011:12
WERTHEIM [85] 918:16; 919:11, 17;
927:25; 932:23; 935:8, 17; 938:13;
940:5, 15; 949:11; 953:13; 954:8, 12;
957:16, 21; 959:20, 25; 960:3, 8, 21;
964:8; 967:11; 968:10; 970:24; 974:16;
975:10; 978:11; 981:8; 982:5, 15, 20,
25; 983:24; 985:7,
15, 23; 986:15; 1002:22; 1003:15;
1005:16; 1016:2; 1018:10, 21; 1019:1, 22;
1020:7, 15, 24; 1021:6; 1023:6; 1033:9,
16, 19, 22; 1034:4; 1045:8; 1046:19;
1060:11, 14; 1067:18; 1083:16; 1089:12;
1091:21; 1092:11, 20; 1093:1, 10, 14, 18,
25; 1094:3, 13; 1099:25;
1100:9, 15; 1103:10, 22, 24; 1104:3, 8;
1105:19; 1106:1; 1109:8; 1112:17
Wertheim [3] 1021:10; 1095:4; 1096:8
West [1] 1002:2
WGN [2] 986:2; 1102:18
whatsoever [1] 979:18
Whereas [1] 976:23
whereas [2] 957:23; 1094:10
Whereupon [16] 920:2; 932:11; 956:7;
973:9; 993:18; 996:4; 1024:23; 1041:14;
1060:15; 1070:19; 1071:1, 10; 1076:12;
1077:7; 1112:8; 1114:6
whichever [1] 1111:3
wide [6] 916:4; 917:5, 10, 13; 988:6;
1004:2
widening [1] 953:10
wider [4] 954:9, 11, 12; 1029:23
willing [2] 1063:12; 1094:12
wish [3] 931:7; 1009:11; 1066:16
withdraw [1] 995:24
WITNESS [104] 927:21, 24; 928:2;
933:23; 935:13, 22; 938:3, 7, 14, 22;
939:3; 940:7, 20; 943:21; 944:1, 8, 12;
946:11, 21, 25; 947:4; 949:15; 953:21;
954:11, 14; 957:7, 19; 958:1; 959:22;
960:2, 5, 10; 963:7, 16; 964:15; 965:2;
967:6; 968:13;
971:3; 974:19; 975:12; 981:10; 982:7, 18,

21; 983:3; 984:7, 15; 985:13, 17; 986:5,
17, 22; 987:6, 13; 988:17, 25; 1003:1, 18;
1005:18; 1016:4; 1018:14, 25; 1019:4, 25;
1020:9, 18; 1021:3; 1023:8; 1033:11, 18,
21, 24; 1034:8; 1035:22; 1045:11;
1046:21; 1081:14,
20, 25; 1083:20; 1089:14; 1092:7, 13, 24;
1093:8, 13, 16, 22; 1094:2, 5, 20, 24;
1095:14; 1100:4, 13, 19; 1102:24; 1103:2,
14, 23; 1104:2, 6; 1109:10
witness [34] 912:22; 919:7, 8; 920:4, 5;
927:4; 932:25; 962:15; 963:1; 968:9;
995:13, 19, 24; 996:1; 1016:7; 1065:5,
10, 13, 22; 1066:10, 13, 25; 1069:14;
1087:23, 25; 1096:14; 1104:18;
1105:22; 1106:20, 21; 1109:13, 22;
1112:8, 12
witnesses [4] 919:16; 1112:11; 1113:18
WLIW [8] 1062:11; 1088:13; 1089:6;
1090:21, 22; 1092:6; 1098:23; 1099:2
won't [4] 931:1; 932:20; 1041:7;
1104:18
wondering [2] 957:21; 1081:5
WOR [1] 1102:18
wording [1] 935:6
words [10] 929:23; 938:5; 976:21;
983:14; 984:9; 1000:13; 1023:7; 1032:4;
1089:21; 1090:13
work [13] 914:25; 920:22, 25; 922:10;
924:24; 941:13; 980:20; 1040:20, 23;
1048:20; 1101:7; 1113:13, 22
worked [7] 921:6; 1005:19; 1010:19;
1038:13; 1040:16; 1052:14, 20
working [4] 921:3; 922:5; 1041:5;
1043:24
worry [1] 988:15
worth [2] 931:4; 944:10
Wouldn't [2] 985:23; 1029:18
wouldn't [14] 1002:15; 1005:20;
1023:2; 1028:14, 16, 18; 1029:3, 14, 19;
1046:2; 1064:14; 1087:13; 1091:6;
1092:22
write [3] 955:22; 970:12; 1078:7
writing [1] 1079:11
written [1] 919:19
wrong [5] 1012:11; 1013:25; 1027:22;
1028:1; 1041:23
Wrote [1] 954:23
wrote [1] 1080:7
WTBS [13] 986:1; 1061:16; 1062:11;
1063:24; 1088:12; 1090:5; 1098:23;
1101:19, 22; 1102:3, 18; 1103:11, 15
WVIA [3] 1063:25; 1090:6; 1091:3

Y

Yeah [4] 917:4; 1063:20; 1078:22;
1091:18
year [49] 923:24; 929:9; 935:6; 936:7,
8; 938:17; 939:21; 957:23; 965:4;
966:12; 969:20; 970:2; 972:9, 13, 22;
973:18; 990:25; 997:10, 16, 25; 998:5,
16, 19, 24; 1000:18; 1012:1, 2; 1013:18,
20; 1046:1; 1047:2, 12, 13; 1048:4;
1057:14, 16;
1072:22, 23; 1074:15; 1075:20; 1086:13,
19; 1089:20; 1098:16; 1099:24; 1100:8
years [46] 921:24, 25; 925:2; 929:12;
949:8, 12, 14; 951:7, 11, 14, 17; 952:19;
954:7, 16; 955:3; 957:24; 958:2, 3, 12;
966:18; 970:8; 971:1; 972:20, 23;
985:20; 990:20, 21; 1011:10; 1012:8;

1013:14; 1016:16; 1017:24; 1024:5;
1026:17; 1036:20;
1038:12, 13; 1040:16; 1045:23, 25;
1046:5; 1057:12, 17; 1073:1; 1075:19;
1097:13
yesterday [9] 910:4; 911:2; 912:17;
973:25; 986:25; 987:17; 989:8, 11;
1026:22
yield [2] 1017:20; 1018:23
York [5] 1002:1; 1005:11; 1007:24, 25;
1008:18
You'd [3] 961:4; 985:7; 1102:22
you'd [4] 1044:25; 1045:16; 1060:24;
1064:14
you'll [3] 942:15; 1025:13; 1067:23
You've [1] 917:2
you've [14] 954:19; 967:17; 969:3;
1002:24; 1014:21; 1018:21; 1021:11;
1030:5; 1031:11; 1097:13; 1100:16;
1102:10; 1103:12; 1107:7
yourself [1] 1049:25

Z

zero [22] 969:18; 970:3, 8, 22; 971:13;
972:3, 21; 974:12, 13; 975:3; 992:12,
15, 20, 25; 993:1; 994:24; 995:5, 6;
1009:10; 1026:17; 1027:5; 1080:11
zeros [3] 1009:24; 1081:5, 13